

The bases for the authority of the Australian Constitution

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What are the possible bases for the authority of the Australian Constitution? Why should people and judges ever obey the text of the Constitution? The developing tools of analytical jurisprudence assist in answering these questions.

Despite its currency, the concept of “sovereignty” provides little assistance in understanding how law provides reasons for action. The concept of authority is more useful. The text of the Australian Constitution has authority in that it provides presumptive reasons for action, overruled when they appear sufficiently erroneous on a cursory examination.

The Constitution is part of the Australian legal system. A legal system is normally identified partly by moral norms. These moral norms themselves require that legal systems also be identified where possible by reference to the directives of a previous de facto authority – even when that previous authority no longer has power to make new legal norms. A legal system will be “legitimate” if any improvement to be achieved by revolution would be outweighed by the uncertainty revolution creates.

Against this theoretical background, various theories about the Constitution’s authority can be assessed. Although the enactment of the Constitution by the Imperial Parliament provides the Constitution with legal authority, it does not confer moral legitimacy.

Contrary to a growing judicial and academic consensus in Australia, the Constitution’s legitimate authority is not derived from the “will of the people”. Nor is it derived from the Constitution’s Founders. The will of the people cannot be identified reliably, and would not provide sufficient reasons for action. The Constitution does embody a federal compact between the colonies. Because it is worthwhile to keep political promises, the polities of the States should fulfil this compact, even though the compact only imposes weak obligations on the Commonwealth.

Other possible bases for the Constitution’s authority are also inadequate. These include claims that judges are bound to apply the Constitution because their authority is based upon it; that the Constitution embodies “associate obligations”; and that the Constitution is a commitment to protect individual rights and democracy.

Instead the Constitution has legitimate authority principally because it coordinates individual action towards desirable goals. The Australian Constitution settles the location of authority by authority.

For my mentors

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Chapter 1 - Introduction

1.1 Obeying the Constitution

Phil Cleary won an election in 1992 to become a member of the House of Representatives of the Commonwealth of Australia. Seven months later the High Court stripped him of his position. During the election campaign Cleary had been on leave without pay from his employment by the Victorian Education Department as a teacher. Cleary had resigned his post before the poll was actually declared, and well before he took office as a Member of Parliament. Section 44 of the Australian Constitution provides that a person who “holds an office of profit under the Crown” cannot be “chosen” as a Member of Parliament. The Court decided that Cleary’s employment by the Victorian Education Department contravened this provision.¹

It is difficult to believe that Australia was governed any better or worse merely because Cleary contested an election campaign whilst still employed as a state school teacher. But there is no suggestion in the various judgments of the High Court that the case could simply have been decided on that basis. All the judges assumed that the Constitution mattered, as did the precise words of its text. Surely they could have seen the “justice” of the situation? Why did obedience to the Constitution matter?

1.2 Legal philosophy and constitutional law

This is not a question which a constitutional lawyer would often ask. Most constitutional lawyers consider their field to be a technical one in which their primary task is to elucidate the rules of a particular legal system. Moral and political questions are relevant chiefly when they directly affect the inclusion or shape of a particular constitutional rule. The underlying justification for the entire system is seldom an issue.

Legal philosophers do consider why law should be obeyed, and the role of rules and moral norms within legal systems. But often they do not explain how these theories might justify the constitutional law of a particular country. And lacking this practical application, their theories are sometimes so general that they do not address all of the arguments relevant to justifying a particular constitution. The question in respect of a particular constitution is not “how might any constitution be justified”, but “how might this particular, reasonably just, constitution be justified?” This is the essential question of my thesis.

1. *Sykes* (1992)

My aim is to investigate the general problem of why one should obey a constitution, by examining a particular country. The concrete example throws up detailed problems and issues which might escape a more abstract approach. Australia is an interesting case study because of its history of continuity, the complications raised by its federal structure, and its history of popular involvement in constitution-making. Given the immense literature already developed to discuss US constitutional theory, it is worth developing theory in other contexts to challenge assumptions that the US experience can always be generalised to apply to other constitutions.

By investigating how one might justify the *legal system* of Australia, I will then suggest that the Australian Constitution might be justified as part of that system. This normative enterprise leads to another question: if morally desirable ends *can* be achieved through a legal system and a constitution, what features *should* a particular legal system possess so as to advance these ends? This question is often overlooked by legal theory. Dworkin's work, committed to making law the "best it can be" is an exception.² One object of this thesis is to explain why a legal system should be used to constitute a society in the first place, and to suggest some of the features which such a legal system should accordingly have.

Consequently, this thesis fits between the disciplines of jurisprudence and constitutional law. It develops jurisprudential theory about the legitimacy or otherwise of legal systems. And then it attempts to apply this theory to the legal system of Australia, and its Constitution in particular. It is both an exercise in applied jurisprudence, and theoretical constitutional law.

1.3 Moral and legal obligation

The Australian context is convenient for developing more general theory. But this thesis is also a timely project for Australia.

Constitutional law in Australia has seldom been accused of excessive theorising. Few have asked about the source of authority for the legal system, and the Constitution within it. Many have shared the attitude of Dixon CJ that:

An enquiry into the source whence the law derives its authority in a community, if prosecuted too far, becomes merely metaphysical.³

Instead many judges and commentators have simply taken the attitude that their job is "the law", and moral inquiry can be left to philosophers.

2. Dworkin (1986) at 90.

Some legal philosophers do not in fact engage in moral enquiry. Lyons suggested that legal philosophers have *encouraged* the tendency to treat “legal” requirements as on a par with “moral” requirements.⁴ Perhaps he was thinking of Hart’s claim that a judge may apply law, and yet have a “detached” point of view.⁵

Judges do often have a detached point of view in one sense. Presumably the judges in *Sykes* (1992) would have had real doubts about whether depriving Cleary of his seat would have been morally justified if there had been no rule in the Constitution about holding an “office of profit under the Crown”. However, the judges in *Sykes* (1992) - and Phil Cleary himself - *ought* to have been committed at least to the view that general application of the law is morally preferable to the alternatives. Moral immunity is not conferred on judges merely because they are applying law. Both people and judges use law and the Constitution to shape some of the most fundamental decisions affecting their community. The action of applying law affects the well-being of others, and it is therefore the subject of moral argument and decision. Judges and individuals should not participate in wrongdoing merely because it is wrongdoing through a system of law.⁶ Just as Phil Cleary should have been concerned about whether there is an obligation to obey the Constitution, so should the High Court have been concerned.

The argument about why there is a good *moral* reason to obey the Constitution is therefore the “silent prologue”⁷ to every judicial constitutional decision. Judges cannot avoid these moral arguments merely by claiming that following the law is “part of the job”, and that an intellectual division of labour leaves morality to philosophers and theologians.

The need to find substantive moral justifications for judicial decision-making is important in modern society, which is increasingly sceptical of “authority” in general. Attempts to avoid moral justification as outside the enterprises of law and jurisprudence make their critics more doubtful that these enterprises are worthwhile. This thesis outlines and evaluates possible responses to the question of why the Constitution should be obeyed. It

3. Dixon (1936) at 96.

4. Lyons (1993) at 135.

5. Hart (1982) at 155-161.

6. Of course a selfish judge may participate in the system merely because of the personal advantages - salary and status - that the position confers: such selfish reasons are not morally sufficient.

7. The phrase is from Dworkin (1986) at 90, who calls this prologue “jurisprudence” rather than simply “moral argument”.

discusses what might constitute good legal and moral reasons for action. It is an exercise in “practical reasoning” - reasoning about what our practice should be.

1.4 Rules

Any such moral justification must account for the role of rules in the legal order. There is more to “obeying law” than doing what seems best at the time. The process of reasoning which leads to legal decisions is governed, at least in part, by rules. A rule is a source-based norm which can to some extent be identified and applied separately from its underlying justification.⁸ A legal system is partly composed of source-based rules rather than moral norms. The contents of some judicial decisions, whilst in some respects determined by posited legal rules, are determined in other respects by judicial moral reasoning.⁹ However, it is a distinguishing feature of a “legal” system that decisions by judges and individuals about their legal obligations are made only after considering source-based rules,¹⁰ and analysing the situation in terms of the artificial reason of the law rather than unguided moral reasoning.¹¹

In Australia, as in many countries, many of these legal rules are derived by applying the rules of a canonical written text - the “Constitution”. Judges do not merely implement the rules of any institution which appears to the judge to manifest the best possible system of government. The influence of the Constitution’s text at least on judicial rhetoric is overwhelming: only the rarest judicial decisions explicitly claim to be contrary to the Constitution’s text. Even the most radical constitutional decisions usually *claim* the authority of the Constitution’s text [10.3.7]. If we are to justify Australian constitutional practice, we must justify not only the role of rules in law, but also the part which the Constitution’s text plays in determining those rules.

Nevertheless, a complete description of Australian law must also acknowledge the interaction between the norms posited in the Constitution’s text, other posited norms (particular case law), and unposited moral norms. The law of Australia is not exhausted by “the Constitution” and rules derived from it. Australian law includes judicial precedents,

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8. The more complete definition in Schauer (1991) at 112 defines a rule as a general prescription which is entrenched, so that it adds normative weight beyond that supplied by its underlying substantive justification.
 9. Hart (1994) at 124-136
 10. Raz (1995) at 210; Alexander (1991).
 11. Finnis (1992) at 141-143; but cf Raz (1995) at 326-340 who sees legal reasoning as a subset of moral reasoning.

whether or not they are consistent with the Constitution, as well as the limited application of some moral norms.

For present purposes, questions about the precise interaction between text and judicial decision need not be resolved. Hart would claim that within a core of settled meaning judges merely apply the terms of the text, but otherwise make decisions unguided by law; Dworkin would claim that judges employ a seamless interpretative process involving competing considerations of text, plausible justifications which generally explain text and previous decisions, and the judges' own moral judgments.¹² Both models accept that the text of the Constitution influences outcomes so that legal judgments, at least in some cases, differ from moral judgments which would have been made in the absence of the textual rule. The claim that Constitution's text *never* influences judicial decisions depends on a kind of scepticism: the view that linguistic meaning is radically indeterminate. This view is at odds with universal experience of successful communication through language.¹³

Thus an adequate justification of obligation to the Constitution must explain both why there is almost invariably a moral obligation to act in accordance with law, and why this law is often derived from the text of the Constitution. It must explain why judges are usually justified in acting *as if* their only concern were identifying the content of "the law" even though that content is defined, at least in part, by rules abstracted from their justifications.

It follows that this thesis must concern itself both with formal sources of legal authority, and with moral arguments about legitimacy. Ultimately it must explain whether there are *moral* reasons to use *legal* analysis to determine obligations.

1.5 Methodology

My investigation of the justifications for the Australian legal system, and the Constitution's role within it, will use many of the tools of analytical jurisprudence developed over the last 40 years. This analytical tradition has created a sophisticated description of law and phenomena associated with law. Following this tradition, I will show the inadequacies of sovereignty as an analysis of law (Chapter 2). Instead I will describe "authority" and the conditions for justified authority (Chapter 3). I will then show how legal systems, and the Australian legal system are defined. In part this exercise is normative - it relies on judgments about the valuable ends which can be achieved through a legal system. The theoretical

12. Hart (1994) at 124-136, 200-201; Dworkin (1986) at 257-258.

13. See Schauer (1991) at 55-62, 191-196.

section of the thesis will conclude with a discussion of the conditions for a legal system to be “legitimate” - the conditions which create obligations to obey the system (Chapter 4).

Against this theoretical background, I can analyse various possible justifications for obedience to the Australian Constitution. Many of these are suggested by the Preamble to the Constitution:¹⁴

Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania ... have agreed to unite in one indissoluble Federal Commonwealth ...

Be it therefore enacted by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: ...

This preamble suggests that the Constitution’s authority is derived from the Imperial Parliament. The Constitution is enacted “by the authority of the Imperial Parliament”. This is a claim about the source of the Constitution’s authority: that within the technical discipline of law, there are legal reasons to comply with the Constitution; and that the Constitution itself then supplies legal reasons for further action. It is not a claim to explain why there are moral reasons to comply with the Constitution; or why the consequences of applying the Constitution might be morally desirable (Chapter 5).

The preamble’s reference to “the people” suggests that the Constitution’s legal and moral authority might be supplied by “the people”. This theory has won increasing acceptance from the High Court over the last two decades. I argue that this theory is both historically insupportable and logically incoherent. Although it may be significant that “the people” were involved in approving the Constitution, and are involved in the political processes which the Constitution requires, these facts are not sufficient to create an obligation to obey the Constitution (Chapter 6). A related theory is that the Constitution’s legal and moral authority flow from the original act of the “Founders” of the Constitution - by which I mean those who drafted the Constitution - principally in a series of Conventions specifically appointed and elected for the purpose. I suggest that it is a weak argument that we should obey the Constitution because of the Founders (Chapter 7).

There are other possible sources for the Constitution’s moral authority. The preamble’s reference to the people of *individual colonies* might suggest that we should honour the “Federal compact” - the deal - between the constituent colonies which became the States of the Australian Federation (Chapter 8). Finally I consider some miscellaneous theories: that the Constitution embodies “associative obligations”; that the Constitution embodies

fundamental values; and that whatever obligations apply to individuals, judges have special moral reasons to obey the Constitution (Chapter 9). I conclude that none of these are sufficient to justify obedience to the Constitution.

Instead, I suggest that there are good moral reasons to participate *in a legal system*. In the absence of an alternative legal system, we should abide by the legal system we have. There are good reasons for us to identify Australia's legal system by reference to previous legally authoritative norms. In particular, the historical enactment of the Constitution by the Imperial Parliament identifies the text of the Constitution, and the results of applying its textual rules, as part of Australia's functioning legal system. There are, therefore, sufficient and powerful moral reasons, if not conclusive reasons, to obey the Australian Constitution. There are moral reasons to comply with the legal reasons supplied by the text of the Constitution (Chapter 10).

14. Aroney (1995) at 254-255.

Chapter 2 - Sovereignty

2.1.1 Why study sovereignty?

This thesis asks what moral and legal reasons might justify Australians in using norms derived from their Constitution. This question requires an understanding of the state, and its relationship with individuals. The concept of “sovereignty” is often invoked to describe state power and the relationship between state and individuals.

The jurisprudential literature suggests three problems with the concept of sovereignty. First, “sovereignty” implies that a state collectively has comprehensive, independent and exclusive power - and many states do not have power of this sort. Second, “sovereignty” implies that a state has a “sovereign”: a single identifiable body or source from which all official action ultimately emanates. Finally, “sovereignty” passes over the role of rules in defining the state itself, and its relationship with individuals. These problems with the concept of sovereignty are salutary for the entire thesis. Much contemporary thought still tends to “personify” state action, and to assume that law can be reduced to the emanation of a single identifiable body or source.

These problems have not been avoided by the varied definitions attributed to “sovereignty” as the concept has developed in political and legal theory. Ultimately I will contend that *no* definition of “sovereignty” will assist in understanding the moral and legal basis of the Australian Constitution. The developing concept of “authority” would be more helpful.

An analysis of sovereignty is also needed because of claims that the Australian Constitution’s authority results from the “sovereignty of the people”. Statements about the “sovereignty of the Australian people” have become common in recent years [6.1.2]. Increasingly it is claimed that this “sovereignty” has consequences for constitutional interpretation. One problem¹ with attributing significance to “popular sovereignty” is that these arguments often depend on a confusion between different senses of “sovereignty”. An analysis of “sovereignty” should dispel some of the confusion.

Merriam identified three different senses of sovereignty.² First, sovereignty may designate the *power of the state over individuals* within its territory: this may be the power of

1. Others are discussed at [6.2].

2. Merriam (1900) at 224-227.

the legislature, or the power of the amending body, or the power of the state as a collective. This first sense - the power of government to command - is the most common. It is the focus of this Chapter. Secondly, sovereignty may designate the *privileges of the government* as a legal entity when compared with individuals. Thirdly, sovereignty may designate the power of *one nation-state in relation to others*. These other senses of sovereignty are sometimes thought to be related to the first [2.4.1-2.4.2].

2.2 Historical definitions of sovereignty

2.2.1 Bodin's justification for supreme power

“Sovereignty” began life as a normative political theory. Bodin claimed that a single entity within a state *should* have plenary power, be unbound by laws or commands of another,³ and be able to issue laws without the consent of any other.⁴ Franklin suggested that Bodin was motivated by his experience of European uprisings which had been encouraged by the belief that subjects had a right to resist unjust government. Franklin argued that Bodin saw the absolute power of a “sovereign” as a bulwark against political instability and violence.⁵

There are dim reflections of Bodin's claim in contemporary jurisprudence. For example, Deane J suggested that there is a presumption that the Commonwealth and States collectively have power to make any substantive law.⁶ Ely suggested that judges should be reluctant to invalidate government action on the basis of its substantive result. Rather, he argued, judicial review should be concentrated merely upon preserving the integrity of government processes, particularly democratic processes.⁷

However, much contemporary political theory typically emphasises the virtue of *limiting* the state. Rights-based theorists such as Dworkin claim that the state should not be able to curtail the basic rights of subjects merely to serve collective interests.⁸ Indeed, some claim that limiting the state is the basic justification for a constitution's legitimacy [9.3]. The consensus that the state should not have plenary power over its citizens is reflected by the rise of international human rights instruments, and the introduction of judicial review of

3. Bodin (1583) at 49.

4. Bodin (1583) at 56.

5. Franklin (1992) at xxiii-xxiv.

6. *Duncan* (1983) at 590-591.

7. Ely (1980) *passim*, e.g. at 181.

8. Dworkin (1977) 184-205.

legislation on the basis of human rights in almost every country *except* Australia. Bodin's claim has been reduced to the proposition that the state should exercise *exclusive power over coercion* [2.4.4]. This does not entail that the state should have *plenary* power.

2.2.2 Austin's conventional definition of sovereignty

Bodin's ideas are reflected by Austin's definition, which I shall refer to as the "conventional definition of sovereignty". Austin claimed that for there to be a "sovereign":

The *generality* of the given society must be in the *habit* of obedience to a *determinate* and *common* superior: whilst that determinate person, or body of determinate persons must *not* be habitually obedient to a determinate person or body.⁹

This theory identifies state action with the action of a "sovereign". In effect, it personifies sovereignty. Austin's sovereign possesses more than the mere power to command.¹⁰ Austin responded to the common understanding of sovereignty as *supreme* power.¹¹ Austin's sovereign has in addition,

- *plenary* power to command anything;
- *independence* from the command of any other body; and
- *exclusive* power to command.

Thus the **conventional definition of sovereignty** claims that in any state there is a sovereign with plenary, independent, and exclusive power.

2.2.3 The Concept of Law

This conventional definition of sovereignty was one of Hart's principal targets in *The Concept of Law*.¹² Hart articulated a number of problems with Austin's theory:

- it does not explain how the authority to make laws is passed from one legislator to another;
- it does not explain how laws persist long after their original legislator has perished;
- it assumes that the sovereign's power *must* be unlimited by law; and
- in analysing a democratic electorate as sovereign it tacitly imports the idea of rule subject to law.¹³

9. Austin (1869) at 227 (emphasis in original).

10. "Command" itself is a problematic term as it refers only to positive obligations, and overlooks laws which modify behaviour by providing benefits to those who comply. Much of the law relating to contract and succession falls into this category: see Hart (1994) at 26-44. Perhaps it would be more accurate to talk of "the power to bring it about that ϕ is required". For brevity's sake, I shall refer to all types of government directives - power-conferring as well as duty-imposing - as "commands".

11. *Oxford English Dictionary* (1989) vol 16 at 79.

12. Hart (1994) at 50, 287-288.

The essence of all these criticisms is that sovereignty is an *inadequate* description of official power because it fails to account for the role of rules in law.

Hart advocated abandoning sovereignty as a means of describing law. Instead he asserted that rules themselves govern what “counts” as valid in a legal system.¹⁴ It is not essential to this theory that one can summarise these “rules of recognition” in a simple phrase; nor is it essential that they be perfectly determinate;¹⁵ nor is it essential that they avoid invoking moral standards.¹⁶

Hart’s attack on “sovereignty” may be illustrated by an analysis of the Australian legal system. Whichever bodies in Australia are identified as part of the “sovereign”, their power is bounded by rules. Although the Commonwealth Parliament has substantial power to command, rules define:

- (1) how Parliament is constituted;
- (1) how the rules of (1) may be changed;
- (1) which actions of Parliament constitute legally binding rules; and
- (1) how the rules of (3) may be changed.

Similarly, the Australian people have a substantial power to change the Constitution. But rules define:

- (5) the limits of the powers of the people;
- (5) how the people may exercise their power; and
- (5) how the rules of (5) and (6) may be changed.¹⁷

A similar analysis applies to the judiciary, State Constitutions, Parliaments and electorates. Thus, as with any country, official action in Australia is generally subject to constitutive rules.

What are the consequences for the conventional definition of sovereignty? First, Hart’s attack undermines Austin’s attempt to define the state, official action, and law, in terms of the actions of a personified sovereign. What counts as “valid” depends on conformity with rules, not derivation from an identified person or persons. Second, a state which acts through

13. Hart (1994) at 50-78.

14. Hart (1994) at 100-110.

15. Hart (1994) at 147-152.

16. Hart (1983) at 54-55; Hart (1994) at 247.

17. The rule-bound nature of the power of the “sovereignty of the people” is noted in *McGinty* (1996) at 237 per McHugh J; at 274 per Gummow J.

law can never have “comprehensive” power or complete independence because it is inevitably subject to the limits which these rules impose.

As a result of the rule-bound nature of authority, qualifications must be added to Austin’s conventional definition of sovereignty. An entity may possess the qualities of sovereignty to a significant, but *limited* extent. Combined, the Parliaments and electorates of the Commonwealth and States have *almost* plenary power to command *within a defined sphere of action*; exclusive power to command *within that sphere*, and independence in *most* circumstances.¹⁸ Austin’s conventional theory of sovereignty is particularly apt to mislead if it is thought to suggest that possessing a quality of sovereignty to some extent implies possessing that quality to its fullest extent.

2.2.4 Sovereign implications

Austin’s definition also assumes that the qualities of sovereignty imply each other. A sovereign with genuinely comprehensive power would also have the power to command the end to any restriction on its independence, and the power to over-rule any competitor. Usually a sovereign which is independent will also have exclusive power. However, the three qualities do not necessarily go together. First, independent and exclusive power do not imply comprehensive power. A sovereign may be “independent” in the sense that it cannot be affected by the *will* of another, or have exclusive power to command in the sense that no other person can make new commands, but lack comprehensive power because it is restricted by rules made in the past. Second, independent power does not imply exclusive or comprehensive power. It is possible to have two or more entities whose power to command is defined by rules so that neither can override the independence of the other. These entities would be *independent*, but neither would have *exclusive* or *comprehensive* power to command. The Commonwealth, for example - including its legislature, executive, judiciary, and electorate - has substantial *independence* from the States to command and act within certain fields of endeavour. But it lacks *exclusive* and *comprehensive* power.

Nevertheless, it may be arguable that possessing one attribute of sovereignty to a significant extent implies possessing other attributes of sovereignty *to a limited extent*. This reasoning has underpinned the development of federal implications in both the United States and Australia. Because federal and state governments each have significant power to command which is not derived from the other government, it follows that their actions must to

18. Hart (1982) at 220-242 criticises Austin’s definitions for these reasons, and provides counter-examples to the absolute power which Austin posits.

some extent be independent.¹⁹ At crucial points, this doctrine was formulated explicitly in terms of “sovereignty”. In *M’Culloch* (1819) Marshall CJ identified certain powers as the “incidents of sovereignty” - that is, incidents of being a government. These powers, he claimed, are not subject to control by other levels of government.²⁰ Thus the federal government’s power to form a bank could not be controlled by means of State government taxation. In other words, plenary power to command within a sphere of action implied independent power within that sphere.

In *SPSF* (1993), Dawson J used the language of “sovereignty” to make the same point in respect of the Australian federation. He claimed that the power to command implied a certain level of independence from other law-makers:

Within the limits prescribed by the Constitution the States exercise sovereign powers and their sovereignty, albeit limited, must necessarily be inhibited if they are unable to make the same choices for themselves as are available to those over whom they exercise those powers.²¹

Similarly, in *Residential Tenancies* (1997), McHugh J said:

Within their respective domains, the polities that make up a federation are regarded as sovereign. Because that is so, it is a necessary implication of the document that creates the federation that no polity in that federation can legislate for another. Federalism is concerned with the allocation of legislative power, and it is a natural and, to my mind, necessary implication of a federation that no polity can legislate in a way that destroys or weakens the legislative authority of another polity within that federation.²²

However, as already noted, sovereignty is a question of degree. Although a “sovereign” polity must have *some* power to command, and *some* independence in the exercise of its power to command, the degree required is ambiguous. Necessarily there will be *some* interaction between different governments in a federation. The majority in *Residential Tenancies* attempted to draw a line between those aspects of government functioning which will, and will not, be independent. The problems of defining degree encouraged them to formulate a bright line test. They described government immunity in terms of discrimination: does the burden imposed by one level of government affect the other level of government more than it affects citizens?²³ According to this doctrine, only *limited* independence is implied by governmental authority. *Total* independence is not a necessary corollary of possessing the power to command.

19. The development of these doctrines, and their link to “sovereignty” is comprehensively documented in Claus (1997).

20. *M’Culloch* (1819) at 428-429.

21. *SPSF* (1993) at 280 per Dawson J.

22. *Residential Tenancies* (1997) at 518 per McHugh J (concurring).

23. For further discussion of federal implications, see Claus (1997).

Thus Austin's conventional definition of "sovereignty" is a dangerous tool for analysis. It falsely assumes that possessing one quality of sovereignty - comprehensiveness, independence or exclusivity - necessarily implies the others.

2.3 Sovereignty and institutions

2.3.1 Austin and institutions

Austin defined sovereignty as the totality of the power to make coercive legal rules, including the power to amend the Constitution. Thus he defined the British "sovereign" as the Monarch, the members of the House of Lords, and the electorate of the House of Commons, acting in concert.²⁴

Although Austin did not define sovereignty so as to be applicable to a particular institution of a democracy, he did claim that sovereignty refers to a particular *set* of institutions which constitute a "determinate superior".

2.3.2 Individual democratic institutions cannot be "sovereign"

Whether or not consistent with Austin's definition, the literature about the "sovereignty of the people" and "parliamentary sovereignty" clearly does envisage the concept of "sovereignty" (however defined) applying to a *single* institution. The conventional definition of sovereignty is particularly apt to mislead when applied to particular institutions of a polity.

A single democratic institution inevitably possesses less than the sum total of state power. The totality of possible state power is inevitably divided in a federation, a political structure whose very point is to divide power. Provided that there is a rule of law, power is divided between legislature (with power to make laws) and judiciary (with power to conclusively determine their application). State power is inevitably divided in any country with an entrenched constitution. As Bryce pointed out, sovereignty is then divided between the legislature, and the institution capable of amending the constitution.²⁵ If the power to

24. Austin (1869) at 253.

25. Bryce (1901) Vol 2 at 53 reads:

In a country governed by a Rigid Constitution which limits the power of the legislature to certain subjects, or forbids it to transgress certain fundamental doctrines, the Sovereignty of the Legislature is to that extent restricted. Within the sphere left open to it, it is supreme, while matters lying outside its sphere can be dealt with only by the authority (whether a Person or a Body) which made and can amend the Constitution. So far as regards those matters, therefore, ultimate Sovereignty remains with the authority aforesaid, and we may therefore say that in such a country Legal Sovereignty is divided between two authorities, one (the Legislature) in constant, the other only in occasional action.

Thus Bryce's claim is merely that the body with power to amend has "ultimate sovereignty" *over those matters beyond the power of the legislature under the Constitution*. Cf the description in *McGinty*

amend in fact requires the concurrence of a number of institutions, the situation is even more complex, as the “sovereignty over amendment” is itself divided. Even with a simple “all-powerful” legislature capable of amending its own constitution, power is divided between electors (with power to choose the legislature) and legislature (with power to make rules).

Thus the *plenary* power which the word “sovereignty” suggests, is never possessed by a single institution in a constitutional democracy. Similarly, a single institution in a constitutional democracy never has *exclusive* power. In Australia, power is shared between a number of institutions including the electorates, legislatures, executives, and judiciaries, of both the Commonwealth and the States and Territories. It might be possible for a democratic institution to be *independent* of other institutions even though it lacked comprehensive power. It is at least arguable that, without an entrenched constitution (and ignoring the possibility that the judiciary might attempt to enforce Parliamentary adherence to European law), the United Kingdom Parliament is independent of the judiciary. The judiciary cannot direct the legislature to perform, or not perform, any particular act. The converse is not true: legislation can confer status and powers on judges, and can require judges to make certain decisions. However, many institutions are interdependent. The judiciary and executive are interdependent: each can affect the other in certain ways, defined by rules. The relationship between electorate and legislature should also be analysed as one of mutual interdependence. Whilst the legislature can impose requirements on the individuals which make up the electorate, and can define the electorate, the electorate can by voting identify which individuals will compose the legislature.

The institutions of the Australian Commonwealth are mutually interdependent to a much greater extent. State legislatures can bind the Commonwealth executive.²⁶ State legislatures cannot affect directly the operation of the Commonwealth electorate,²⁷ although indirectly they may influence the conduct of Commonwealth elections, for example through defamation law.²⁸ State legislatures can increase, but not curtail, the power of the Commonwealth Parliament. The Commonwealth Parliament can bind State executives directly,²⁹ although this power is not unlimited.³⁰ It can curtail the powers of State

(1996) at 237 per McHugh J, 274-5 per Gummow J which represents Bryce as claiming that *only* the amending body has sovereignty [2.3.4]

26. *Residential Tenancies* (1997).

27. *Pearson* (1983).

28. Although the extent to which they might do so constitutionally is limited: *Lange* (1997).

29. By legislation pursuant to s 51.

legislatures,³¹ although it cannot interfere directly with their operations.³² The Commonwealth Parliament can alter the powers and composition of the Commonwealth electorate.³³ However, some features of the electorate are beyond simple alteration by Commonwealth legislature.³⁴ The electorate can select the members of the Commonwealth legislature. And it can amend the powers of the Parliament.³⁵ But its powers of amendment are limited, and require the cooperation of the Commonwealth executive and at least one House of the Commonwealth Parliament.³⁶ Thus various institutions in Australia are interdependent. Every institution can affect most of the others; and no institution has unilateral power to immunise itself completely from the actions of another.

In conclusion, whether one defines sovereignty as plenary, exclusive, or independent power, no single institution in a modern democracy possesses it. Certainly, no institution in Australia, including “the People”, comes close. It is particularly inappropriate to apply the conventional definition of “sovereignty” to individual institutions of a constitutional government.

2.3.3 Sovereignty defined as “official power”

Nevertheless, “sovereignty” may be used to refer to the powers of a body which possesses power which is sufficiently close to being plenary, exclusive and independent. The question of degree may be illustrated by the differences between the Victorian State Parliament, and local councils in Victoria.³⁷ The State Parliament is often described as having “sovereignty”; local councils almost never so. Local councils have power to make local by-laws which bind those within the physical boundaries of the locality. But this power is closely circumscribed by the delegation of powers to them by the State Parliament.³⁸ The State Parliament’s powers, by contrast, are far less restricted, even after one considers the need to avoid inconsistency with Commonwealth law.³⁹ Local councils have some legal

30. *Australian Education Union* (1995); *Victoria v Cth* (1996); and of course the law must fall within a head of power defined by s 51.

31. Also by legislation pursuant to s 51.

32. *Melbourne Corporation* (1947).

33. Sections 7, 8, 9, 10, 14, 27, 29, 30, 31, 34.

34. Sections 7, 8, 9, 12, 15, 24, 25, 32, 33, 41.

35. Section 128.

36. Section 128.

37. The structure of local councils is similar in other Australian States.

38. *Local Government Act 1989 (Vic)* s 111, Sched 1.

39. *Commonwealth Constitution*, s 109.

independence - they cannot be abolished simply by the will of the State executive. However, they may be abolished by the State Parliament, and the possibility is not merely theoretical.⁴⁰ By contrast, abolition of a State Parliament is subject to stringent procedures which require the consent of either the State's Parliament, or a majority of its electors.⁴¹ The independence of a State Parliament is not complete, but it is significantly greater than that of a local council. A local council can affect its own operation through local laws governing the conduct of meetings.⁴² However, this power is relatively limited when compared with the wide powers of the Victorian Parliament to alter its own Constitution.⁴³

The definition of "sovereignty" as "possessing significant power to command", unlike Austin's definition, is applicable to specific institutions, and admits that state power may be rule-bounded. However the definition does no analytical work. Whilst it implies *some* power to command, some exclusivity, and some independence, it does not indicate the extent of these features. If "sovereignty" is defined in this way, a country may have several "sovereign" governments, and numerous "sovereign" institutions. On this definition, the "people" may well have sovereignty, but so do many other institutions.

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40. The Victorian Parliament abolished many existing local councils, and replaced them with State government appointed administrators, many of whom were given a brief to organise the amalgamation of their own jurisdiction with another. See Victoria, Legislative Assembly, *Parliamentary Debates*, vol 420 (19 October 1994) at 1231-1260 for a debate discussing some of the issues.
41. A State may be abolished by Constitutional amendment, approved by either House of the Commonwealth Parliament, a majority of electors in a majority of States, a majority of electors in the abolished State, and a majority of electors in any State with which it is merged (s 128). A State may also be abolished by Act of Commonwealth Parliament approved by the Parliaments of the abolished State and the State with which it is merged (s 124). A State may be abolished and turned into a Commonwealth Territory by Act of Commonwealth Parliament approved by the Parliament of the abolished State and by a majority of electors in that State (s 123).
42. *Local Government Act 1989 (Vic)* s 91.
43. *Constitution Act 1975 (Vic)* s 18. It had been thought that the only legal restriction on this power was the requirement to follow any previously mandated procedure: *Taylor* (1917); *McCawley* (1920); *Clayton* (1960); *Union Steamship* (1988). However, more recently, Deane J suggested in *Stephens* (1994) at 257 that the Commonwealth Constitution implies restrictions on the constitutional structures which States may create for themselves. This suggestion may have been laid to rest for the moment by the Court's unanimous decision in *Lange* (1997) that the only legitimate source of implied constitutional restrictions in this regard is the express requirement in ss 7 and 24 that representatives for the Commonwealth Parliament be "directly chosen" by the people.

2.3.4 Sovereignty defined as the power to amend

Another definition of “sovereignty” is the power to amend the Constitution. McHugh and Gummow JJ in *McGinty* (1996) claimed that:

ultimate sovereignty resides in the body which made and can amend the Constitution.⁴⁴

This definition of sovereignty assumes that the body which “made” the Constitution is the same as the body which “can amend” the Constitution. However, it is possible for the body which makes a constitution to confer power on a different body to amend it.⁴⁵ This applies to Australia. Whilst legally the Imperial Parliament made the Constitution, from the point of view of Australian courts the Imperial Parliament no longer has power to amend the Constitution [5.2.1]. Instead, the Constitution can only be amended by Australian institutions.⁴⁶ Lacking any authority to make new law for Australia, it would be nonsensical to describe the Imperial Parliament as having “sovereignty” in Australia today. Clearly the maker of a constitution is not necessarily the sovereign.

What then of Sawyer’s more limited assumption that sovereignty rests with those institutions capable of amending the Constitution?⁴⁷ Finn’s view appears to be similar. He claimed that:

political sovereignty [is] the power to insist upon and to enjoy the form of government of [one’s] own choosing.⁴⁸

Presumably, therefore, “legal sovereignty” is the legal power to insist upon and to enjoy the form of government of one’s own choosing - in other words, the legal power to amend a society’s constitutive rules.

This “sovereignty” has notable features. First, “sovereignty” is not necessarily constant. The body with power to amend at one time may confer that power on another body. (This would not be true if the constitution forbade self-reference; the Australian Constitution does not.) Second, “sovereignty” may be shared. The consent of more than one body may be necessary for amendment of the Constitution.⁴⁹ Third, “sovereignty” does not imply

44. *McGinty* (1996) at 237 per McHugh J, 274-5 per Gummow J. They purported to rely on Bryce (1901) at 53 for this proposition. However, this is not Bryce’s view: see fn 25.

45. Winterton (1998a) at 5.

46. *Commonwealth Constitution*, s 128; *Australia Act 1986 (Cth)*, ss 1, 15(1).

47. Sawyer (1987) at 75.

48. Finn (1995) at 3; see also Lumb (1978) at 153:

In order to attempt to discover the basic rules of recognition ... one must recognise that the overall pattern is reflected in a set of rules which are not integrated into one ultimate norm, although s 128 potentially does provide the means for achieving that integration and thus in one sense merits that description.

49. Winterton (1998a) at 8.

comprehensive power. The system as presently constituted may confer power on one body to amend, but confer power on other bodies to exercise other significant powers - such as making ordinary legislation. Of course, an exercise of those other powers is subject to the over-riding force of constitutional amendment. But if the body which makes ordinary legislation has a veto over the amendment process, the possibility is entirely theoretical. *In practice*, power is divided. For example, in Australia, the Commonwealth Parliament, which makes legislation, also has an effective veto over Constitutional amendment. Fourth, this “sovereignty” is governed by rules. The body or bodies with power to amend can do so only in accordance with a pre-defined rules.⁵⁰

Thus the wider claim of McHugh and Gummow JJ that the people are sovereign because they have power to make and amend the Constitution is flawed for three reasons:

- it assumes that the same body has power both to make the Constitution and to amend it;
- it conveys the misleading impression that the body with power to amend has constant, exclusive, independent or rule-free power; and
- sovereignty, defined as the power to amend, may be possessed by a number of institutions within the same polity.

Of course, one can stipulate that “sovereignty” is the power to *participate* in amending the Constitution. But this stipulative definition is liable to be confused with the ordinary language understanding of sovereignty. In ordinary speech, “sovereignty” approximates to the conventional definition [2.2.2]. For this reason, Quick and Garran argued that there is “no absolute sovereignty” in Australia, but instead the people have a “*quasi-sovereignty*” expressed through a constitutional referendum.⁵¹

2.4 Other concepts of sovereignty

2.4.1 Privileges of government

The first sense of “sovereignty” I have explored is that of the power of a government to command individuals. As outlined in [2.1.1], it has another sense: the privileges of

50. This feature is noted in *McGinty* (1996) at 237 per McHugh J, at 274 per Gummow J, although the judgments do not consider whether it reduces the usefulness of sovereignty as a concept.

51. Quick & Garran (1901) at 988.

government as compared to individuals. These privileges exclusive to a government are often described in the UK and Australia as the prerogative powers of the executive.⁵²

It is arguable that these two concepts of sovereignty are related. The power to command may imply some governmental privileges. This is the logic of the intergovernmental immunities doctrine in Australia. The High Court recently reconsidered federal government immunity in *Residential Tenancies* (1997). The joint judgment decided that State legislation can affect Commonwealth executive “activities” but not Commonwealth executive “capacities”. The judgment appears to define the distinction between activities and capacities by comparison with the rights, powers, privileges and immunities of an ordinary citizen. If the Commonwealth’s right in a particular circumstance under the common law is no greater than that of an ordinary citizen, then State legislation affecting the right is characterised as affecting the “activities” rather than the “capacities” of the Commonwealth. The net effect is to preserve from State legislation whatever attributes of “sovereignty” (meaning the power distinctively possessed by governments) that the Commonwealth does possess. The underlying assumption is that the Commonwealth’s power to command (the first concept of sovereignty) implies that its privileges as a government (the second concept of sovereignty) should be immune from interference by other institutions.

2.4.2 Sovereignty at international law

“Sovereignty” has a distinct meaning in *international law*. A state which is “sovereign” has a status which is accompanied by a number of internationally recognised rights and obligations. At international law,

[S]overeignty is not only used as a description of legal personality accompanied by independence but also as a reference to various types of rights, indefeasible except by special grant, in the patrimony of a sovereign state, for example the ‘sovereign rights’ a coastal state has over the resources of the continental shelf.⁵³

A key corollary of sovereignty is the “jurisdiction, *prima facie* exclusive, over a territory and the permanent population living there”.⁵⁴

This ideal theory of sovereignty in international law is weakening. Increases in international trade and international communication, the development of weapons of mass

52. Evatt (1987) at 11 discusses whether the royal prerogative includes *all* of the Crown’s capacities not conferred by statute, or whether it is restricted to those crown privileges over and above the rights of ordinary citizens.

53. Brownlie (1998) at 107-108.

54. Brownlie (1998) at 289; see also *Mabo [No 2]* (1994) at 31-33 per Brennan J, at 78-79 per Deane and Gaudron JJ; *Seas and Submerged Lands* (1975) at 364 per Barwick CJ.

destruction, a greater appreciation of international ecological problems, and the growing jurisdiction of international bodies to protect individual rights, have all encouraged and legitimated international interference within what was once considered a nation's inviolate sovereignty.⁵⁵ In international law theory, as with domestic law theory, the comprehensive power which "sovereignty" suggests is misleading. Rather, "sovereignty" is whatever rights and liabilities are conferred by the rules of international law.⁵⁶

At international law, Australia is a "sovereign" nation, because it is recognised as a state by the international community. Murphy J linked this international sovereignty to the authority of the people in *Kirmani*:

On 1 January 1901, British hegemony over the Australian colonies ended and the Commonwealth of Australia emerged as an independent sovereign nation in the community of nations. From then, the British Parliament had no legislative authority over Australia. The authority for the Australian Constitution then and now is its acceptance by the Australian people. Any continuing authority over the Australian people by the British Parliament would be inconsistent with Australia's sovereignty; Australia would not be a legitimate member of the community of nations.⁵⁷

However, to say that "Australia is an independent sovereign nation" (because other nations recognise its rights at international law to exclusive jurisdiction within its borders), does not imply that "the Australian *people* are sovereign". International law generally does *not* regulate the manner in which the jurisdiction of a sovereign nation will be exercised internally. Indeed, other nations are generally bound by international law *not* to intervene concerning matters within the domestic jurisdiction of another.⁵⁸ At the precise point that a nation has international sovereignty, doctrines of international law themselves decry the significance of international status for a nation's internal affairs.⁵⁹

Thus, except where the Australian Constitution itself invokes a concept as defined by international law, such as "external affairs", treaty-making capacity,⁶⁰ or citizenship,⁶¹ the

55. Camilleri & Falk (1992) at 241-256.

56. See Araingio-Ruiz (1972) at 702-704.

57. *Kirmani* (1985) at 383 per Murphy J. Similarly, see *Australian Capital Television* (1992) at 138 per Mason CJ. Cf *Kirmani* (1985) at 442 per Deane J putting the more arguable proposition that because the people are sovereign, Australia is independent of other countries, and therefore has international sovereignty.

58. Brownlie (1990) at 291-292.

59. The High Court recognised this distinction between internal and external sovereignty in *Seas and Submerged Lands* (1975) at 376 per McTiernan J, at 452-453 per Stephen J, at 480 per Jacobs J. It has long been part of sovereignty theory: see Keith (1929) at 1, 182-183.

60. *Commonwealth Constitution*, s 51(29). See *Seas and Submerged Lands Case* (1975) at 373, *Tasmanian Dams Case* (1983).

acquisition of international sovereignty is not logically significant for the *internal* interpretation of Australian law. Certainly, international law makes no presumptions about the source of authority for the government of a nation, or whether its own citizens ought to obey it. Nor does it make any presumptions about the internal distribution of power.

Nevertheless, Finlay argued that by transferring powers over defence, coinage, and similar matters to the Commonwealth government, the Australian States renounced any claim to sovereignty at international law. Hence, he claimed, they must acknowledge the superiority of the Commonwealth government's sovereignty, such as its priority concerning debts.⁶² However, the status of Australia *internationally* does not affect its *internal* distribution of power. Indeed, classical doctrines of international law suggest otherwise. Finlay's argument confuses two of the senses of sovereignty. "Sovereignty" (meaning a nation's status at international law) has no direct relationship with "sovereignty" (meaning a government's privileges). The argument is only plausible because the same word is used for both concepts.

Murphy J put a similar argument in a number of cases concerning the application to Australia of legislation of the Imperial Parliament. He argued that Australia's acquisition of international legal personality necessarily precluded the direct application of Imperial legislation by Australian courts. However, the fact that international law permits Australia to exclude Imperial legislation, does not necessarily imply that domestic law excludes Imperial legislation. As Hayne J put it recently:

[W]hether some other polity can or would seek to legislate for [Australia] and whether Australia is treated internationally as having the attributes of sovereignty ... are not questions that intrude upon the immediate issue of the administration of justice according to law in the courts of Australia. In particular, they do not intrude upon the question of what law is to be applied by the courts.⁶³

Therefore, the sovereignty of Australia at international law has limited significance for sovereignty within Australia. Certainly it does not imply that any Australian institution is "sovereign". Nor is international sovereignty directly relevant to interpretation of Australia's domestic constitution. International law merely indicates that, taken collectively, Australian institutions - however they may be organised - have the right *at international law* to exclude the operation of the laws of other nations.

61. *Nolan* (1988) at 183-186.

62. *Finlay* (1982) at 472.

63. *Joosse* (1998) at 265.

2.4.3 Sovereignty and political power

MacCormick suggested a dichotomy between jurisprudential understandings of sovereignty (the rule-bound, legally limited authority described by Hart) and political understandings of sovereignty (the brute fact of political power).⁶⁴ This political view holds that sovereignty is possessed by the institution which, as a matter of fact, can “have its way”. The view was exemplified by Galligan’s argument that the Australian people have sovereignty because they were, and are, the “determining political force” in Australia.⁶⁵ Ultimately their desires determined both the shape of Australian institutions, the Constitution, and the legal means to embody them.

This language of “sovereignty” is loose. Galligan might have been using any one of at least three definitions of sovereignty. He was ambiguous about whether a body is sovereign if:

- (1) its views were and are *determinative* of the Constitution;
- (1) its views were and are the *dominant influence* on the Constitution; or
- (1) its failure to object was and is a *necessary condition* of the Constitution.

Claim (1) is historically untenable. The Constitution was also influenced by, amongst others, Griffith and Clark,⁶⁶ officers of the Colonial Office,⁶⁷ the colonial premiers,⁶⁸ the British Colonial Secretary,⁶⁹ and the occasionally idiosyncratic views of Convention delegates.⁷⁰ If these individuals had not been involved, the Constitution would now read differently. This is hardly surprising: few processes are so historically determined that they are entirely immune from the influence of individuals.

64. MacCormick (1993) at 11-14.

65. Galligan (1995) at 1.

66. See La Nauze (1972) at 75-81 on the influence of Griffith and Clark on the initial drafts of the Constitution.

67. See La Nauze (1972) at 170-176, 183-186, de Garis (1969) *passim* on the influence of the Colonial Office on the draft constitution both before and after the draft was formally transmitted to London.

68. E.g. the amendments made by the Premiers at the Federal Council in 1899. Although these were based on resolutions of the New South Wales Parliament, the negotiations of the Premiers were also influential: see La Nauze (1972) at 241-247.

69. See La Nauze (1972) at 259-269 on Chamberlain’s role in amending the provision relating to Privy Council appeals.

70. E.g. Abbott’s personal interest in astronomical and meteorological observations which resulted in s 51(8), cited by La Nauze (1972) at 279: see *Australasian Convention Debates, Adelaide* (1897) at 775-776.

Claim (2) is more arguable historically. Federation itself, the broad outlines of the Constitution, and the presence of many specific provisions,⁷¹ were an historically inevitable result of popular support for these measures. The popular will influenced the views of Convention delegates and colonial politicians. But one could equally argue that the Constitution was the result of politicians' support for the Constitution, and their success in influencing the public to support them. Both rulers and the ruled were able to influence each other. If one defines "the sovereign" as "the institution with dominant influence", then sovereignty in Australia depends on the interpreter's point of view rather than a value-free description. Does one focus on the influence of rulers, or the influence of the ruled?

Claim (3), which defines sovereignty as the power of veto over constitutional arrangements, does not specifically identify the Australian people as sovereign. No doubt, without popular support, the Australian Constitution would not have been enacted. But it is equally true that the Constitution would not have been enacted - or at least would not have been enacted in its eventual form - without the agreement of a number of other identifiable groups. Each House of each Parliament of each colony, and the electorate of each colony, also had sovereignty in this sense. The initial rejection of the Constitution in New South Wales, and the amendment of the draft to accommodate the concerns of the New South Wales Parliament, demonstrate that these group interests were identifiable and distinct.

In any case, Claim (3) sets the bar too low. Popular acquiescence is a necessary condition for any *de facto* authority [3.1.2, 6.3]. If a society which succumbs to the demands of an evil dictator has "popular sovereignty", then the claim is trivial. Certainly "popular sovereignty" in this sense lacks the moral significance which is typically attributed to it.

Furthermore, this description of a society in terms of raw political power is impoverished. It ignores the significance of constitutive rules in the political life of the society. It may be true that the British government would ultimately not have prevented Australia from unilaterally declaring its independence in 1900.⁷² But that is not what happened. All those involved - colonial electorates, colonial politicians and British government - chose to clothe the Constitution in Imperial garb. Galligan simply assumed that the hypothetical ability to declare independence unilaterally is significant, whilst the actual

71. E.g. a clause which would give the Commonwealth parliament power over old-age and invalid pensions (now s 51(23)) was initially defeated in the Constitutional Convention, but then included after a number of delegates were convinced that this provision would increase popular support for the Constitution: see La Nauze (1972) at 204-206.

72. La Nauze (1972) at 254.

form of the Constitution is not. From the internal perspective of those involved in Australian federation, an Imperial Act had legitimacy which a unilateral declaration of independence lacked. They were prepared to pay a real price for this legitimacy - including submitting to the Imperial Parliament's insistence on the continued supervision of the Privy Council over Australian courts [6.4.3]. Hart's argument against Austin can be deployed equally effectively against Galligan: any adequate description of power and legitimacy *must* account for the attitudes of those whose actions comprise the political community. Rhetorical appeals to "popular sovereignty" ignore first the fact that political institutions were, and continue to be, shaped in accordance with current rules for constitutional change, and secondly, that there are good reasons to do so.

Of course, from the internal perspective of Australians, popular involvement in the Constitution's adoption was also important to its legitimacy [6.1.1]. A complete theory of legitimacy from the point of view of Australians in 1900 must account for the significance of *both* popular referendum *and* the use of pre-existing legal forms. The language of sovereignty is inappropriate to this task because it tends to suggest that one fact is supreme above the others.

Much of the political theory literature does not even address the problem of rule-bound sovereignty.⁷³ As recently as 1986, Hinsley asserted that sovereignty is a necessary part of an adequate description of government:

[Arguments against sovereignty] could not meet the primary need to ensure the effective exercise of power.... If this need was to be met, the only remaining recourse was to locate sovereignty in the body-politic which the community and state together composed, the community being regarded as wholly or partly the source of sovereignty and the state as the sole instrument which exercised it. No political or legal system can function unless it possesses coercive machinery which can ultimately enforce compliance with decrees of the regulating authority, ... that authority, whether it be notional or tangible, is by definition the state, and ... the concept of sovereignty ... authorises and justifies its acts.⁷⁴

It is true that a modern state can only survive with a legislature capable of making rules and coercing compliance with them. However, it is possible for the modern state to function even if its power is constrained by rules, and even if certain actions are beyond the power of state institutions. Indeed, all democratic states function in this way. In effect Hinsley is compelled to define sovereignty as the (limited) power to command, which collapses to no more than an assertion of the need for authority.

73. Hinsley (1986) notes Hart (1994) in his bibliography, but does not discuss his argument. A number of other recent political theory monographs dealing with sovereignty do not even mention the jurisprudential literature: e.g. Bartelson (1995); Camilleri & Falk (1992); Weber (1995).

74. Hinsley (1986) at 222-223.

2.4.4 Sovereignty defined as exclusive coercive power

Hinsley's conclusion does suggest one sustainable definition of sovereignty. Sovereignty might be defined as the monopoly of coercive power within a society. The sovereign would then be defined as those institutions which collectively control that monopoly. This accurately describes one aspect of official power in most societies: a discrete set of institutions monopolise the right to use force themselves, or to approve the use of force by others.

Even this description of sovereignty is breaking down. As Camilleri and Falk pointed out, the concept of sovereignty ignores many social, economic and political arrangements by passing over both the informal arrangements of civil society and the effect of internationalisation.⁷⁵ International law is moving towards permitting foreign military intervention in the domestic affairs of a country for humanitarian purposes, as with Kosovo in 1999. The growth of transnational institutions, some with authority to make rules directly binding on individuals, has also resulted in both participating states and transnational institutions lacking sovereignty.⁷⁶ Australia does not yet participate in any institution comparable to the European Union. But Australia's increasing participation in international institutions is at least a pale reflection of this development.

But passing over these qualifications, the description of sovereignty as monopolising coercion is underpinned by a normative judgment that the state *should* monopolise coercion. Without that monopoly, disaffected groups are liable to resort to force to settle their grievances. Rough "frontier justice" would then be inevitable; deliberate intimidation of the physically weak would be likely. One justification for government is that it can solve free-rider and prisoner's dilemma problems [3.1.2]; it would be unable to do so if some people could use force to avoid their obligations.

Precisely because monopolising coercion is justified in this way, it is part of the *description* of an "ordinary" state.⁷⁷ By contrast, there is no "sovereignty" of this sort in some societies, such as those fighting a civil war. Because the failure to monopolise force is so undesirable, a society which fails to do so is accordingly described as lacking a "state".

75. Camilleri & Falk (1992) at 31-39, 238-241.

76. McCormick (1993) *passim*.

77. Finnis (1980) Ch I, Bix (1995) explore the relationship between value judgments about what is worthwhile, and description.

2.5 The sovereign people

2.5.1 Problems in definition

The various definitions of sovereignty discussed are all inadequate. They either describe the state inaccurately, or tend to mislead by describing some limited aspect of the functioning of the state in terms of “sovereignty”, a term which usually suggests a much broader concept. The conventional definition of “sovereignty” has little useful meaning for domestic law. It can be taken to mean plenary, independent, or exclusive power. Unless the basic rules of a legal system forbid their own amendment, a legal system cannot have any single institution which is sovereign in this sense.

Sovereignty does have legitimate senses. It may be used to define the powers of a government, particularly its power to command citizens. It may describe the state’s monopoly over coercion. Such definitions must acknowledge that this power is limited, and rule-bound. So defined, Australia has a number of institutions which all participate in exercising “sovereignty”, including State and Commonwealth legislatures, executives, judiciaries, and electorates.

Alternatively, sovereignty may refer to the power of amendment. In Australia, this power is shared between a number of institutions, and is not possessed primarily by the people. As a result, it is misleading to claim that the Australian people are “sovereign” because they participate in amending the Constitution. The Australian people do not have exclusive “sovereignty over amendment”. The Constitution can only be amended by the Commonwealth Parliament in concert with either the electorate⁷⁸ or the State Parliaments.⁷⁹ Of course, the electorate may change the members of Parliament. But this is not an indicator of ultimate power. The Commonwealth Parliament can, to some extent, alter the electorate.⁸⁰ If Australia has “popular sovereignty” because the people have power to amend, then to the same extent Australia has “Commonwealth Parliamentary sovereignty”. Indeed it is arguable that the Commonwealth Parliament’s power to *propose* rather than merely *veto* amendment is the greater power.

78. Under s 128.

79. Under *Australia Act (UK)*, s 15; see Fraser (1994) at 217-218; although Crawford (1992) at 190 suggests that this power may be implicitly limited because it cannot alter the terms of s 128.

80. Sections 8, 30; although query whether the power to define the electorate is limited by the requirement that members be “directly chosen by the people” (ss 7, 24): see *McGinty* (1996) at 201 per Toohey J claiming that these sections should be interpreted as requiring a “universal adult franchise”.

Sovereignty has two further legitimate senses. It may refer to the privileges of executive government, as compared to ordinary citizens. Alternatively, it may refer to the status of a nation at international law. Neither of these senses of “sovereignty” is applicable to “the people”.

Thus any meaning of “sovereignty” applied to “the people” is misleading. It is only true if one uses a very limited definition of “sovereignty”. But it suggests, through confusion with common usage, that the people have a much broader power.

2.5.2 Claims for popular sovereignty

Despite these problems in defining sovereignty, it is increasingly claimed that the Australian people are sovereign. For example, Mason CJ wrote that:

Because Australia received its Constitution as a statute of the Imperial Parliament and it was part of the British Empire, there were difficulties in the notion that our Constitution derived from the authority of the people, though in fact it originated with their representatives and, in substance, was adopted by the people. With the *Australia Acts* of 1986, those difficulties disappeared, with the result that it is possible to say, as in the case in other modern liberal democracies, that *political sovereignty resides in the people* and that the elected representatives of the people exercise their powers on behalf of, and in the interests of, the people. The new emphasis on the origins of constitutions and the political sovereignty of the people underscores the representative character of modern democracy and the notion that a constitution is to be read not only as an instrument allocating and delimiting powers but also as an instrument which confers rights on citizens.⁸¹

The claim that the Australian people are “sovereign” is not defensible on the basis of any of the definitions of “sovereignty” discussed. It must appeal to some inarticulate definition. The danger with such an approach is that the conventional definition may be relied upon at subsequent stages in the analysis. Given the problems inherent in the concept of “sovereignty”, those using the term have a responsibility to define the term before employing it further.

This conclusion may alarm those who assume that every legal system must have a sovereign. It is commonly believed that if no other body is sovereign, therefore the people must be.⁸² However, as the discussion has shown, the absence of one institution with sovereignty - e.g. the Imperial Parliament - does not imply the existence of another. Rather the absence of an institution possessing the conventional attributes of sovereignty is to be *expected* in a modern constitutional democracy.

81. Mason (1996b) at 30 (emphasis added). Similarly, see Galligan (1993) at 61.

82. E.g. Hinsley (1986) at 222, quoted above fn 74.

Perhaps, however, by “*political* sovereignty” Mason CJ was referring to the *moral* reasons for obedience to the Constitution, and the claim that the consent of the people is a sufficient - perhaps necessary - condition for the legitimacy of the Constitution. He may have had in mind a similar distinction between legal and moral reasons for obedience when he wrote of the “untenable view ... that the Constitution derived its legally binding force from the *sovereignty* of the Australian people”⁸³ yet claimed that “the status of the Constitution as fundamental law “springs from the *authority* of the Australian people”.⁸⁴ Whether the consent of the people is relevant to the moral legitimacy of a Constitution is the subject of Chapter 6.

For the moment, however, we can conclude that sovereignty is not particularly helpful for describing or justifying Australia’s political institutions and legal system. The conventional definition of sovereignty is inapplicable to Australian institutions. Rather, a complete description of the Australian political community must include an account of its complex legal system. Furthermore, an analysis of sovereignty has done little to explain what might justify obedience to that system.

A fresh start is required. First we need an account of how legal norms are used in practical reasoning, and why people might be justified in using them. This will be supplied by the analysis of “authority” in Chapter 3. Then we need an account of how these legal norms are identified as part of a particular legal system, and what justifies the adoption of a particular legal system. I will develop these themes in Chapter 4.

83. Mason (1986) at 24, n 89 (emphasis added), relying on *China Ocean* (1979) at 209-214 per Stephen J.

84. Mason (1986) at 24 (emphasis added).

Chapter 3 - Authority

Because legal validity cannot usefully be described in terms of sovereignty, Hart used an account of “secondary rules” to describe the structures of any mature legal system. In Chapter 4, I will develop a more detailed description of legal structures. But assuming that we understand what counts as a “law” within a particular “legal system”, we also need an account of how laws figure in the reasoning of individuals. Hart did not explain why his “secondary rules”, or the “primary rules” made or recognised in accordance with them, are reasons for action. His claim that the law involves an “internal point of view”¹ merely labelled the problem.²

People who do obey laws have a “committed point of view”. This could be motivated by fear, unreflective adherence to tradition,³ or a mutual but mistaken belief that others consider the system desirable.⁴ In the central case of law, legal norms are part of the moral justification for decisions.⁵ Theories of authority attempt to indicate how legal norms are used in practical reasoning, and why they might be considered to provide moral reasons for conformity. “*De facto* authority” and “legitimate authority” are crucial concepts for the remainder of the thesis. They will be used to analyse how law generally, and the Australian Constitution in particular, might figure in the reasoning of subjects.

The following account of authority chiefly follows Raz (1986).⁶ However, it qualifies his definition of the manner in which subjects may employ authoritative rules as reasons for action.

3.1 Defining authority

3.1.1 *De facto* authority

A regime with “*de facto* authority” makes directives with two features: the regime claims (rightly or wrongly) that people have a moral obligation to comply with its directives; and people generally do (as a matter of fact) comply with its directives, whether from fear, or

1. Hart (1994) at 112-117.

2. McCormick (1994) at 63-64, 139-140; cf Hart (1994) at 243.

3. Hart (1994) at 202-203.

4. Sartorius (1987) at 51-52.

5. Raz (1984a) at 129-131; Postema (1996) at 84.

6. Other expositions, occasionally using different terminology may be found in Raz (1983) at 3-33; Raz (1989); Raz (1995) at 210-237.

a belief that the regime's moral claim to obedience is justified.⁷ As discussed below, legal authority is *de facto* authority [3.3].

The claim to a moral duty of obedience distinguishes a legal system from the demands of a gunman. However, the concept of a "claim" must be elaborated. In normal usage, a "claim" is constituted by a statement *of the person benefiting from the claim*, and is *express*. However, neither of these features is inherent in Raz's description. The claim Raz envisaged need not be a statement made by the regime which *issues* authoritative directives, but may be constituted by the attitudes of officials, or of most of the populace, who *obey* the directives. Raz's claim need not be express, but may be tacit, demonstrated more by action than articulated statements. Finally, the claim is made (or more accurately, the attitude is held) with respect to the *system* of authority, rather than any particular authoritative directive. A "regime claims legitimate authority", therefore, if those participating in the regime's political community - or at least those administering the regime - apply the regime's directives as if they accorded with what I shall call "direct reasons".

"Direct reasons" are those reasons which would apply to the subject in the absence of authoritative directives.⁸ Raz called direct reasons "dependent reasons". However, this label is misleading: dependent reasons do not depend on anything - rather authoritative directives depend on them.⁹

The claim to "legitimate authority" is that conformity with authoritative directives would result in actions in accordance with direct reasons. This is a subtly defined claim. First, direct reasons *apply* to subjects; they are not necessarily in the *self-interest* of subjects. For example, there may be direct reasons for soldiers to go on a suicide mission, even if it is not in their self-interest.¹⁰ Second, the claim concerns the *outcome* of directives, not the regime's reasoning process. Sometimes the means to achieve outcomes most consistent with direct reasons may be for a regime to determine directives on the basis of reasons - such as administrative convenience - which would not figure in the reasoning of its subjects.¹¹

7. Raz (1986) at 23-28.

8. Raz (1986) at 38-47.

9. Raz (1986) at 41 uses the terminology of "dependent reasons" to denote *both* direct reasons, and the authoritative reasons which depend upon them. As he says, the context will distinguish between these two possibilities. However, the label is almost always used to refer to direct reasons, perhaps because the labels "authoritative directives" or "authoritative reasons" are available for the alternative.

10. Raz (1986) at 47-48. This is because I can have *reason* to be other-regarding, even when that is not in my *self-interest*: see Halpin (1997) at 207-209.

11. Raz (1986) at 52-53.

Authoritative directives may not always in fact achieve outcomes in accordance with direct reasons. However, the necessary condition for *de facto* authority is that this claim is made.

3.1.2 Justifying the legitimacy of authoritative directives

The “normal justification” for authority is that a person will comply more closely with the direct reasons which apply to him or her by complying with authoritative directives, rather than by attempting to apply the direct reasons for himself or herself.¹² There are other justifications for obedience, such as the desire to identify with a group. However, of itself, Raz said, this cannot justify obedience. There is only good reason to “identify” with a group if one trusts in it; and this trust is misplaced unless the normal justification for authority also generally holds.¹³

The normal justification will apply, and a directive will be “legitimate” if:¹⁴

- the regime has greater expertise;¹⁵
- the directive supplies a salient solution, facilitating coordination and cooperation towards a particular goal in situations where there are multiple desirable goals, not all can be fulfilled, and there is no reason to pursue any one goal rather than the others; or
- the directive solves Prisoner’s Dilemma problems by providing assurance to one individual that others will also conform.

The latter two justifications for legitimate authority only apply if the directive has *de facto* authority. A directive cannot coordinate, and cannot solve prisoner’s dilemma problems unless people do generally treat the directive as authoritative.

Raz also claimed that an authoritative directive is justified if it chooses for administrative convenience between options which an individual has no good reason to discriminate between.¹⁶ He appeared to suggest that arguments of administrative convenience rely for their justification on the substantive directive choosing between two

12. Raz (1986) at 53.

13. Raz (1986) at 55. See also [4.5.3]

14. Raz (1986) at 48-51.

15. Expertise in this context refers to *effective* expertise - it considers what one actually knows, not what one could find out. Expertise can concern facts (because the regime know more technical details, or is better at predicting outcomes) or morals (because the regime is less weak-willed, or better at moral reasoning).

16. Raz (1986) at 48-49.

incommensurable options. However, arguments of administrative convenience may have greater weight than this. They are one form of decision-making cost.

Decision-making costs generally provide a reason to follow authoritative directives rather than to apply direct reasons. The costs of gathering, analysing, and applying information may outweigh the advantages of applying direct reasons. Decision making may consume both physical resources and personal opportunities to pursue more worthwhile projects. For example, if I investigated those claiming to be needy, perhaps I would identify the genuine problems more accurately than the local council. But the improved accuracy might be outweighed by the cost of the investigation, and the value of other projects which I consequently neglected. I would do better to pay taxes to the local council to support the needy, and spend my time building a playground. Thus inaccuracy may be justified by a less costly process. Decision-making costs are often an important reason for rationally allocating decision-making responsibility between individuals and institutions.¹⁷

Decision-making costs are secondary in the sense that they are only relevant if authoritative directives are at least a reasonable approximation of direct reasons. If a regime commands comprehensively evil results, then even uninformed personal direct decision-making is likely to be an improvement.¹⁸ Nevertheless, decision-making costs significantly alter the calculus of legitimacy in practice. One should apply an authoritative directive if:

- the good done by applying the authoritative directive;
- less the costs of applying the authoritative directive,

is greater than,

- the good done by applying direct reasons;
- less the costs of applying direct reasons.¹⁹

Thus decision-making costs provide partial reasons to believe that acting in accordance with authoritative directives will provide a better approximation to direct reasons. Therefore they need to be considered in determining whether a regime meets the normal justification.

17. See generally Komesar (1994).

18. Perhaps for this reason Raz (1983) at 243-244 classifies considerations of decision-making cost as “secondary prudential reasons”; and Raz (1986) at 75 classifies them as “a borderline case between normal and deviant justification”.

19. These “costs” include both the resource cost and the opportunity cost of more detailed decision-making.

Finnis suggested that the normal justification for authority may apply for another reason. He argued that the systemic nature of authority creates a means for laying further plans for cooperation. Authority does not merely secure those existing forms of cooperation towards particular goals; it also secures (through what is itself a form of cooperation) the efficient creation of new forms of cooperation towards newly identified common goals.²⁰ Raz accepted that this is a reason to obey, but did not accept that this is part of the normal justification of authority.²¹

Finnis argued that not only *can* legal authority solve coordination problems, but it is the only practical means of doing so.²² Hence, obedience to legal authority is generally desirable. Finnis' argument depends on the following steps:

- It benefits all people if coordination problems are solved.
- The choice between alternative solutions to coordination problems can only be made by unanimity or a source accepted by most as authoritative.
- Unanimity is practically unachievable; therefore a source which is obeyed by most - and which claims obedience from all - is the only practical way to solve coordination problems.
- Therefore, it is desirable to conform to an authoritative source which will be obeyed by most people in order to solve coordination problems.

Justifications based on minimising decision-making costs and on the value of creating a process for coordination are important justifications for authority. Raz relegates both considerations to a different classification because they do not apply unless the regime also meets the other components of the normal justification to some extent.²³ Nevertheless, both considerations can provide good reasons to obey a directive without further inquiry into its correctness. They are unlike deviant justifications such as a mere desire to avoid punishment. There is no value in a regime promulgating a directive merely so that its subjects can conform so as to avoid punishment. But there *is* value in a regime promulgating even imperfect directives if they reduce subjects' decision-making costs, or create a system which supplies further opportunities for beneficial cooperation.

20. Finnis (1980) at 238-247.

21. Raz (1986) at 101-102.

22. Finnis (1980) at 238-247.

23. Raz (1983) at 243-244, 247-249.

A rider applies to this definition of legitimacy. An otherwise justified authoritative directive will be illegitimate if in the circumstances, deciding autonomously is more important than getting the answer right or coordinated.²⁴ This rider depends on Raz's assumption that the making of an autonomous choice can have an inherent value in some circumstances.²⁵ On this view, a directive may be illegitimate even though it accords with direct reasons. Instead, there is merely a moral duty to decide independently to do that which the directive commands. In these circumstances, there is no obligation to obey the directive *qua* directive; instead there is a duty to decide for oneself, a duty which should - if one's reasoning is accurate - result in the same action as if conforming to the directive.

3.1.3 The obligation to obey legitimate directives

In most circumstances, an individual has a duty to obey legitimate directives. This result follows from the definition of the normal justification: if obedience with a directive allows a subject to conform more closely with direct reasons, then this is also a sound reason for a subject to conform.²⁶

Nevertheless, in exceptional circumstances, legitimate directives impose no duty to obey. There may be no such duty if it would be inconsistent with the directives of a *more* legitimate regime - i.e. an alternative regime whose directives would provide an even better approximation to the direct reasons than those of the first regime;²⁷ or an alternative regime whose directives would provide an equally good approximation to the direct reasons, but which unlike the first regime enjoys the consent of its subjects [4.5.3].

There may also be a "collateral obligation to obey" an authoritative directive which does not meet the normal justification if some of the regime's other directives are legitimate, and obedience promotes the value of identifying with a group,²⁸ or the virtue of not encouraging disobedience to other authoritative directives which are legitimate.²⁹ It may then be justified to obey a particular rule, even if an alternative action would be preferable in the absence of the rule.

24. Raz (1995) at 365-366; see also Raz (1986) at 57.

25. George (1993) at 172-188 contests this claim, arguing that only *correct* autonomous choices are valuable.

26. Finnis (1987) at 71-75; but cf Sartorius (1987) at 55-56. Raz is not entirely clear - see Raz (1986) at 53, 70-80. The connection between legitimacy *of a regime* and the duty to obey is discussed at [4.4.8].

27. Raz (1986) at 57.

28. Raz (1986) at 91-94.

29. Raz (1986) at 101-102.

3.2 The exclusory operation of authoritative directives

3.2.1 Pre-emptive authority

What is the significance of authoritative directives for practical reasoning? Raz claimed that authoritative directives pre-empt the direct reasons: they replace the direct reasons as reasons for action in the minds of subjects.³⁰ The pre-emption thesis implies that every authoritative directive has a source. An authoritative directive could only provide a reason for action to replace the direct reasons if its content were identifiable other than by the direct reasons. However, a source need not be a single identifiable entity. Directives have a source if they are identifiable by their conformity with a complex set of rules of recognition.

Raz claimed that his account of authority necessarily implies the pre-emption thesis. Treating a source as authoritative has no point unless the source's directives are treated as pre-emptive. If treating a source as authoritative excludes the cost of examining the direct reasons, then there would be no point in examining those direct reasons before acting on a directive. Similarly if an authoritative directive facilitates collective action by collective commitment, there would be no point in considering whether other courses of collective action were possible. And finally, if an authoritative regime has greater expertise, there would be no point in second-guessing its conclusions.³¹

Raz qualified this conclusion. Even if a regime *generally* has greater expertise, the subject may be able to identify *particular* decisions for which the regime has less expertise. And a directive may be identifiable as mistaken - a "clear mistake" - without considering *all* of the reasons which led to the decision.³² Sometimes this is because a particular reason rules out particular answers, including the proffered answer. To use Raz's example, the answer to a sum of whole numbers cannot be a fraction. Thus it is possible coherently to treat a source as authoritative, but to ignore its directives when a consideration of *some* of the direct reasons indicates that the directive must be mistaken. However, Raz's pre-emption thesis insists that it is incoherent to treat a directive as having authority but to reject it on the basis of a consideration of *all* the direct reasons.³³

30. Similarly, Hart (1982) at 243-261 defines authoritative directives as "content independent peremptory reasons for action". Hart's term, "peremptory", is perhaps more precise than Raz's "pre-emptive". But to avoid breeding new terms, I shall use "pre-emptive".

31. Raz (1986) at 58-59. See also Postema (1996) at 88-93 for a more detailed description of the relation between the pre-emptiveness of authoritative reasons, and the claim that an authoritative reason must have a source.

32. Raz (1986) at 62.

33. Raz (1986) at 62.

3.2.2 Presumptive authority

By contrast, under Schauer's theory of "presumptive positivism", particular directives can be identified as mistaken by a cursory examination of all the direct reasons.³⁴ Such judgments depend on an assessment of *all* the direct reasons, particularly those which are amongst the most controversial moral concepts, and which one would expect to be excluded by the pre-emption thesis.³⁵ Deciding that a directive is mistaken does not necessarily require an *exhaustive* consideration of the direct reasons.³⁶ Instead, it is possible to consider *all* the direct reasons in a cursory way, and then decide that a rule is, or is not, "unreasonable". Schauer's second claim is that such a cursory examination is likely to identify principally those directives which deviate substantially from the result which would be reached by an exhaustive consideration of the direct reasons.³⁷ Schauer claimed that one can, and should, presume the correctness of authoritative directives, but ignore them if that presumption conflicts with a cursory examination of the direct reasons.³⁸

Presumptive positivism is a *logically coherent theory* on the assumptions that:

- it is possible to examine reasons at different levels of detail; and
- a cursory examination of reasons can provide some indication of the outcome of those reasons, and in particular, indicate some range of outcomes as mistaken.

Presumptive positivism appears to be a *reasonable description* of how judges behave in *some* circumstances.³⁹ It is manifested in doctrines such as that:

- the literal meaning of a statute should be over-ridden if it would produce an absurd result;⁴⁰
- an existing common law rule should not be applied if the result is "manifestly wrong" - i.e. it diverges too far from morally acceptable results;⁴¹ and

34. Schauer (1991b) at 667-671, suggesting that, on the best reading of their work, Dworkin and Kennedy also support this claim.

35. Postema (1996) at 101-103.

36. Perry (1989) at 933-936; Schauer (1991a) at 88-91, 203-206; Schauer (1991b) at 674-679.

37. Schauer (1991b) at 676-677.

38. Schauer (1991b) at 679-691.

39. Perry (1989) at 936-941; Bix (1993) at 91-94.

40. Bennion (1997) at 751-783. The process may also be described as one of adopting a strained but remedial construction (*ibid*), or of adopting a "rectifying construction" (*ibid* at 675-686). In any case, the claim to be implementing the legislative intent seems little more than a polite fiction: the Parliament is simply assumed to want the morally desirable result, despite the contrary indications of the literal text.

- an administrative decision should be quashed if it is so unreasonable that no reasonable decision-maker could have come to it.⁴²

Nevertheless, it is possible to treat directives as conclusive reasons for action. For example, courts in Australia and the UK treat the order of a superior court as a *conclusive* reason for action. Charged with failing to obey a superior court order, it is no excuse that the order was wrong, or even manifestly wrong. Subject to exceptions which by their very nature do not require examination of all of the grounds which led to the decision, the order is regarded by all courts as a conclusive reason for action.⁴³

Presumptive positivism, as opposed to the conclusive application of authoritative directives, is *normatively desirable* if:

- disobedience to bad directives - the costs saved by ignoring mistaken directives which are identified as incorrect by a cursory examination of direct reasons, outweighs:
 - decision-making costs in every case - the cost of examining direct reasons in a cursory way in *every* case;
 - decision-making costs in problematic cases - the cost of a detailed examination of direct reasons in those cases identified as mistaken after a cursory examination; and
 - mistaken disobedience - the cost of not applying correct directives which are misidentified as wrong (this includes the costs of desirable cooperation which fails because one or more subjects disobey).

(This calculus ignores mistaken directives which a cursory examination does not reveal as mistaken. The cost of obedience to such directives must be borne whether or not authority is treated as merely presumptive).

3.2.3 Pre-emption and presumption

Should this account of presumptiveness be incorporated within the description of authority? How we define authority depends upon what we consider important about the concept, or our purpose for using it.⁴⁴ One might be interested in authority because it describes the claims that are made by governments. Or it might be interesting because it

41. See generally Horrigan (1992). In respect of the UK, see Cross & Harris (1991) at 135-143. This test simplifies the actual test applied by the courts. Other factors may also come into play, such as the extent of reliance on the precedent: Horrigan (1992) at 211-212.

42. *Peko-Wallsend* (1986) at 40-42.

43. Lanham (1988).

describes in part how governments function. Or one might focus on authority's usefulness for practical reasoning. At various points, Raz invokes each of these considerations in defining authority.⁴⁵

Ultimately it matters little how authority is defined so long as the definition leaves space to describe all the interesting features of the subject of inquiry.⁴⁶ The current inquiry into authority was provoked by the inadequacy of the internal point of view for describing how government and its directives figure in the minds of subjects and judges. In particular, how might official directives provide moral reasons for activity or legitimately be the basis for legally coerced outcomes? If this is the focus of inquiry, and in practice subjects and judges use directives presumptively, then a good conceptual analysis must be capable of describing this phenomenon, and exploring possible justifications for it.

Raz's claim that authority *must* be pre-emptive is not convincing. None of the important features which govern the definition of authority implies pre-emptiveness. Pre-emptiveness is neither an accurate description of all government directives, nor of the claims of all governments, nor of subjects' reasoning about authoritative directives. I have already shown how pre-emptiveness is not necessarily a good description of how government directives are applied.⁴⁷ Nor is it necessarily *claimed* that they are applied pre-emptively. A regime does not "claim" anything; rather the officials who participate in its administration make claims [3.1.1]. If they accept that courts treat directives presumptively rather than pre-emptively, then they do not "claim" that directives are pre-emptive. It is irrelevant that the statute book reads as a series of pre-emptive commands. A rule cannot determine the manner of its own application: rather that is determined by the officials and subjects of the system in which the rule exists. Finally, it is possible for presumptive but not pre-emptive directives to mediate desirably between subjects' decision-making and right reason. If I apply directives unless they are "clearly wrong", then they will - most of the time - make reasoning easier than trying to apply reasons directly. No doubt if I applied directives pre-emptively, the cost of

44. Finnis (1980) Ch 1; Bix (1995) at 479.

45. Raz (1995) at 359 (definition of authority on the basis that as a matter of fact governments present their directives as conclusive); Raz (1995) at 217 (definition on the basis that the claims and conceptions of government contribute to a concept of authority); Raz (1995) at 218-220, 225-226 (definition on the basis that the *purpose* of authority is to mediate between people's decisions and the reasons which apply to them).

46. Halpin (1997) at 14-15.

47. Text accompanying fn 39-42.

decision-making would be even lower. But *ex hypothesi*, such reasoning would be a less good approximation to the direct reasons.

Where does presumptive positivism leave Raz's definition of authority? Essentially it qualifies the pre-emption thesis. A regime is treated as having authority if its directives generally exclude consideration of direct reasons either in the sense that:

- the directives replace consideration of at least some direct reasons (Raz's view); or
- the directives have presumptive force against consideration of direct reasons - i.e. the directives exclude any *detailed* consideration of the direct reasons, unless on a preliminary consideration of the direct reasons a subject considers that the directive is clearly erroneous (Schauer's view).

Directives have moral authority if applying them in either manner results in better conformity with direct reasons.

It would be misleading, however, to assume that these two forms of the exclusory operation of reasons are a simple dichotomy. Rather, they are points on a continuum between applying authoritative directives conclusively, and ignoring them altogether. The authoritativeness of directives is weaker if direct reasons are considered in more detail, or if directives are overridden even though they deviate less substantially from the application of direct reasons.

At the extreme, all authoritative directives of a regime provide *conclusive* reasons for action. Falling short of being conclusive, but with a strong presumption of correctness, a system approximates Raz's definition in which directives are *pre-emptive* reasons for action. Even then, according to Raz, an authoritative directive may be overridden if it is manifestly incorrect on the basis of *some* of the direct reasons. On the presumptive positivist model, directives of an authoritative regime are decisive in a range of circumstances. The weaker the presumption, the closer the system approaches Dworkin's description of "law as integrity" in which judicial decisions balance *any* improvement in moral outcome against the value of following authoritative rules.⁴⁸ Provided that the attitude towards authority remains one of *presumption*, this extreme is not reached.

Within a particular legal system, different directives, and different classes of directives, may have different presumptive weights. Different decision-makers may accord different weight to the presumption that authoritative rules should be followed. A system can

48. Dworkin (1986) at 255-258.

itself vary the strength of the presumption by penalising deviations which turn out to be mistaken (assuming there is a reliable means to identify mistaken deviations).⁴⁹

3.3 Law and authority

3.3.1 Legal directives and presumptive authority

Raz assumed that any legal system has *de facto* authority⁵⁰ - that is, a legal system always consists of directives identifiable by their source, and it is claimed that compliance with those directives, to the exclusion of other reasons, will always result in better conformity with direct reasons than independent decision-making.

However, there are problems in simply equating a legal system with authority. First, do enactments or judicial orders count as “directives” of a legal system? Second, from which perspective is the “authority” of a legal system evaluated: that of the judge in the process of deciding a case, a subject in a situation whose legal consequences have not been judicially decided, or a subject after a court has decided upon the application of the law to the subject’s situation?

From the point of view of a judge trying to decide a case according to law, legislation and common law precedent have merely presumptive weight. As argued above,⁵¹ one of the norms of Anglo-Australian judicial reasoning is that a rule will not be applied if the court considers it manifestly erroneous.⁵² Previous judicial orders with respect to the precise situation before the court, by contrast, are conclusive.⁵³ In deciding whether to apply legislation or a precedent, a judge must use his or her own moral reasoning to determine whether the result would be “manifestly absurd”.

What if my circumstances are not subject to judicial order, and as an individual I try to determine my legal obligations? Again, legislation and precedent merely have presumptive weight. Morality (and the direct reasons), as *I* perceive it, could be the basis for my reasoning both about my “legal obligation”, and about what I expect the court to decide. This is also how a legal system appears to a judge. A judge applies a moral norm not because the judge

49. Schauer (1991b) at 692-694. Whilst it is completely impressionistic, my personal experience is that both officials and individuals in England are more ready than their Australian counterparts to treat authoritative directives as conclusive.

50. Raz (1995) at 215; Raz (1996) at 13-15.

51. Text accompanying fn 39-42.

52. How manifest the error must be before legal invalidity follows may vary depending upon other circumstances and the area of law: in respect of the common law, see generally Horrigan (1992).

53. Lanham (1988).

thinks that it is the morality of other judges, but because the judge thinks that it is moral. A judge expects that subjects will mirror the judge's moral reasoning not by applying a posited norm, but by moral reasoning of their own.

On the one hand, I might know that judicial morality is different from mine. Then judicial morality would be the basis for my reasoning, independent of the direct reasons (at least as I perceive them).⁵⁴ But such judicial reasoning is posited - for *ex hypothesi*, it has characteristics discernible from previous judicial decisions which make it distinct from straightforward moral reasoning. In this case the *combination* of posited legislation and posited norms of judicial reasoning conclusively determine my legal obligation, subject to any subsequent judicial order. But posited legislation *alone* is merely treated presumptively.

Thus from the perspective of both judges and individuals, and whether or not there is a distinctive "judicial morality", legislation and precedents only have presumptive weight in determining legal obligation.

3.3.2 Law and conclusive authority

Once determined in this manner, legal norms *claim* to provide not merely presumptive but *conclusive* moral reasons for action. Like any system of authority, all legal systems claim that their subjects should not consider direct reasons except as required by the legal system itself. In addition, all legal systems claim that their directives should not be overridden by the directives of any other system of authority not incorporated by reference into the legal system. But it is important to remember that what I have classified as a "legal directive" often itself incorporates a *cursor*y judgment of the justice of the outcome. Even then, there may still be occasions when subjects are justified in treating legal norms as outweighed by other moral norms.

The law's claim to conclusiveness is only credible if the legal system also controls the use of force. A claim to provide conclusive moral reasons for action is unlikely to be credible if one is liable to coercion from another source.

3.3.3 The inter-relationship of legal norms

Obeying an authoritative regime entails treating *all* of the norms derived from that regime as providing exclusory reasons for action. If a regime is "authoritative" then it claims that *every* norm identified as belonging to the regime provides a reason for action. A *legal*

54. Postema (1996) shows why subjects will invariably treat authoritative sources similarly to judges.

regime claims to provide *conclusive* reasons for action. Any failure to apply legal norms therefore impugns a fundamental claim of a legal system.

Hart distinguished between primary and secondary rules. Secondary rules are “rules about rules”: rules which indicate the validity of further rules within the legal system, the method for changing rules, and for determining their application.⁵⁵ I shall define primary rules as those which impose duties or confer powers or permissions on individuals to act.⁵⁶ Obedience to secondary rules entails obedience to primary rules. *Every* contradiction of a primary rule to some extent also contradicts the secondary rule which authorised that primary rule. However, there are degrees of contradiction. Disobedience of a primary rule may be in terms which would entail contradicting the secondary rule which authorised it in all, some, or no future cases.

Obedience to “constitutional” rules displays this inter-relationship. The rule “obey the Imperial Parliament” authorised the rule “obey the Australian Constitution”, which authorised the rule “obey laws of the Commonwealth Parliament with respect to elections”,⁵⁷ which (arguably) authorised the rule banning televised political advertising during elections.⁵⁸ The High Court decided in *Australian Capital Television* (1992) that the rule banning political advertising was invalid. If the High Court was wrong, did its decision contradict a “constitutional” rule? The answer can only be “to some extent”. The High Court’s decision did not entail that all laws of the Commonwealth Parliament with respect to elections would be invalid.

If primary rules are breached more often, the secondary rule which authorises them becomes correspondingly weaker. As secondary rules are themselves part of a “legal system” defined by fundamental norms [4.3], any disobedience to a secondary rule also weakens the authority of the fundamental norms. Thus all acts contrary to an individual law of a legal system also disobey the “legal system” to a degree.

55. Hart (1994) at 79-99.

56. Hart assumes that primary rules are duty-imposing and that secondary rules are power-conferring. However, secondary rules may impose duties, and some power conferring rules only indicate the validity of other rules in a very tenuous way: for example the rule conferring the power to cast a vote. See Raz (1983) at 177-179.

57. *Commonwealth Constitution*, ss 11, 31, 51(36).

58. *Broadcasting Act 1942 (Cth)*, Pt IIID, as amended by *Political Broadcasts and Political Disclosures Act 1991 (Cth)*.

In this sense a legal system is indeed a seamless web.⁵⁹ Breaking any one of the strands impairs the ability of all other strands to function. Nevertheless, the web continues to function even after several strands are broken. But it will cease to catch flies long before *every* strand is broken. And ultimately a new web may be spun using some of the strands of an old web.

3.3.4 The authority of the Constitution

In considering the role of the Australian Constitution in the legal and moral reasoning of individuals and judges, a complete picture must reflect all of this complexity. The Constitution is the canonical text of a set of rules. These textual rules have *presumptive* authority in the reasoning of both judges and individuals about their legal obligations. By contrast, the Australian legal system, has *conclusive* authority in determining legal obligations, and claims conclusive authority in determining moral obligations.

Thus claims that the Constitution has “legal authority” can only be understood as claims to *presumptive* authority. Even then, there is still ambiguity in the statement that “the Constitution has legal authority”. It may mean that:

- (1) the Constitution *is derived from* an authoritative legal source; or
- (1) the Constitution *is* an authoritative legal source (“authoritative” because it confers legal authority on other directives).

The statement may encompass both (1) and (2) if the Constitution was promulgated by a legally authoritative source, and the Constitution also provides authority for further directives. However, (2) does not entail (1). It is possible that a legally authoritative source is not itself derived from a legally authoritative source - i.e. for (2) to obtain but not (1). Indeed, necessarily this is true of some legally authoritative source in every legal system.⁶⁰

3.4 Sovereignty and authority

This exposition of authority has not resorted to the concept of sovereignty. The analysis applies equally to directives issued by an omnipotent king, or the complex law-making apparatus of a federal democracy. Indeed, “regime” is deliberately ambiguous - it can refer both to persons who have power, and to a system within which power is exercised. The theory of authority succeeds in explaining how people use authoritative rules as reasons for

59. See Finnis (1984) at 120.

60. Salmond (1893) at 221-223.

action; and the sort of arguments that might justify them in doing so. The theory makes no assumptions about how the directives are created or identified.

The relevant question in analysing the Australian Constitution, therefore, is not “who (or what) has sovereignty?”, but “who (or what) has authority?” That requires an account of how a legal regime is defined, and how participants identify particular laws as belonging to their legal system. Having defined a legal regime, I then ask when a legal regime might be legitimate.

Chapter 4 - Legal System and Legitimacy

This Chapter examines how a legal system is identified. How do we know whether a norm is a “law”? An adequate theory of legal systems must account for the role of rules in identifying a legal system itself. Identifying law in terms of a set of rules does not assume the existence of a “sovereign” person or body. Such an identification abandons assumptions that a sovereign must be “independent”, or have “plenary” power.

One might claim that certain ultimate rules conclusively indicate validity within a particular legal system. Kelsen assumed that every legal system must have such an ultimate rule, whose legal validity is indicated by a presupposed juristic principle, the “*Grundnorm*”. The validity of all the other norms of the legal system is indicated by this ultimate rule.¹ Similarly, Hart claimed that a “rule of recognition” conclusively indicates validity in a legal system. Such theories share one feature of Austin’s sovereignty theory. They posit a single point source which comprehensively indicates validity within a legal system. I shall argue that this strategy is insufficient. Although fundamental rules provide a good approximation to identifying a legal system, a more accurate identification acknowledges that to some extent the content of a legal system is identified by *moral* norms.

The second part of this Chapter asks when a legal system, so identified, is “legitimate”. When *should* a legal system be obeyed? Does legitimacy depend on the state being “democratic”? And if not, what difference does democracy make?

4.1 Ultimate rules

4.1.1 Identifying law by an ultimate rule at a point in time

One might try to identify a legal system by reference to an ultimate rule at a particular point in time. One might then say of the Australian legal system that its ultimate rule is the Constitution, in its current amended form.² However, this ahistorical description would be inaccurate. Firstly, the validity of some norms in Australia is not determined simply by the

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1. Kelsen (1945) at 110-118; Kelsen (1960) at 195-201; Kelsen (1964); for criticism see Raz (1983) at 123-125. The juristic principle of the *Grundnorm* (roughly, “you should obey rules derived from the historically first constitution”) is different from a country’s historically first constitution itself; a country’s historically first constitution is composed of its written Constitution along with any customary constitutional norms: see Kelsen (1960) at 198-201.
 2. Crawford (1992) claims the Constitution is supreme, although he does not put the argument in terms of “sovereignty”. Note that Hart’s “rule of recognition” is not simply the same as the Constitution in its current form; instead the rule of recognition may refer to, say, the Constitution in 1901, and any subsequent amendments which accord with it: see [4.1.2].

Constitution's current form. Rather validity may also depend on the past form of the Constitution, the form of other legislation, and unwritten constitutional norms. Second, the content of the Constitution itself is not arbitrary. It is determined by reference to events (such as referenda), judged by reference to previously existing procedures.

The validity of legislation *now* sometimes depends on the *past* form of the Australian Constitution. For example, take s 57 of the Australian Constitution, which defines at length what constitutes a "deadlock" between the Houses of Commonwealth Parliament concerning a proposed law. Section 57 empowers the Governor-General to dissolve the Parliament if there is a deadlock between the Houses. After the election, if the Houses still do not agree, the proposed law may be validly passed by a joint sitting of both Houses. Now, consider legislation which passed only after a joint sitting in 2005. If the procedure for a joint sitting were amended in 2006, legislation passed in 2005, in violation of the old procedure, but in a manner which fulfilled the requirements of the new procedure, would not be validated by the new procedure.³

Similarly, consider the appointment of a Senator to a casual vacancy. (Section 15, which deals with casual Senate vacancies, was amended in 1977 to restrict replacements to members of the party to which the replaced member belonged.) If a replacement Senator were not from the same party as the retiring Senator, an appointment made before 1977 would be valid when made, *and would continue to be valid after the Constitutional amendment in 1977*. But an appointment made after the 1977 Constitutional amendment would be invalid if it did not follow the amended procedure.⁴ Thus the *present* validity of legislation or appointments may depend not on the Constitution's current form, but on its past form.⁵

3. Whether the procedure specified by s 57 was followed is a justiciable question, and a finding that it was not invalidates the legislation: *PMA Case* (1975). However, not every breach of the Constitution results in invalidity: see *Clayton* (1960) at 246-248 per Dixon CJ, McTiernan, Taylor and Windeyer JJ; [4.2.1].

4. I ignore questions of whether a failure to follow the procedures of s 15 is justiciable. Under s 47 the Commonwealth Parliament could make it so.

5. The retrospective effect of constitutional amendments is governed by the terms of the amendment itself, and by the common law: Constitutional Commission (1988) at 889-895. In the United States constitutional amendments increasing the power of the legislature are only prospective - i.e. they do *not* validate legislation passed before the amendment: Constitutional Commission (1988) at 891. The question is unlitigated in Australia. The better view is that in the absence of express provision, constitutional amendments to s 51 are only prospective: the provision reads that "Parliament may *make* laws with respect to" the various heads of power. Cf a hypothetical provision which read that "Parliamentary laws are valid if they are with respect to..."

However in one example a substantive amendment may have been considered retrospective. *Pharmaceutical Benefits* (1945) at 265-266 per Starke J, at 269, 271-272 per Dixon J, at 281-282 per

The claim that “the Constitution in its current form is sovereign” and conclusively indicates the validity of legislation is flawed for another reason. The claim suggests that there is no means of questioning the authority or form of the Constitution. But the form of the Constitution is not simply a given defined by social practice [4.1.2]. Rather it is determined by a history of acts with legal significance. Its form is governed by past amendments, provided that those amendments accorded with the then extant constitutional and statutory procedures for constitutional amendment. Whether an amendment *is* valid depends on how Parliament *was* composed, as determined by the electoral legislation of the time. The form of the electoral legislation depended on the Constitution at the time the legislation was passed, ... and so on through constitutional and statutory history. Thus the Constitution’s current form is itself determined by events in the past, analysed in terms of the rules, both constitutional and legislative, which were valid at the time of those events. Of course, *sometimes* legal rules are valid even though their enactment did *not* conform to extant rules - but this distinction between invalidity and unlawfulness is itself usually identified by rules of the relevant legal system [4.2.1].

Simple assertions of the Constitution’s sovereignty are incapable of explaining why the Constitution is accepted *in its current form*. Hart’s objection to using the concept of sovereignty in general was that it ignored the way in which a sovereign is rule-bound. The same objection applies to claims about the sovereignty of the Constitution. What constitutes the Constitution is itself identified by historical acts and rules.

Some of these objections may be met if the ultimate rule cannot be amended. Some legal systems include rules which cannot be amended. In the United Kingdom, for example, one version of the doctrine of Parliamentary supremacy is that legislation passed by a constituted Parliament is valid except to the extent that it purports to restrict the power of

Williams J, (*contra* at 250-256 per Latham J, at 273-274 per McTiernan J) cast doubt upon the validity of a wide range of social welfare legislation. Five QCs consulted by the Commonwealth Government gave a variety of opinions in the light of the case; all thought that, amongst other Acts, the *Unemployment and Sickness Benefits Act 1944 (Cth)* was either invalid or of doubtful validity: Commonwealth, House of Representatives, *Parliamentary Debates*, vol 186 (27 March 1946) at 648. An amendment to insert s 51(23A) in the Constitution was designed to provide the Commonwealth with express power to “authorise the continuance” of such legislation: Commonwealth, House of Representatives, *Parliamentary Debates*, Vol 186 (27 March 1946) at 648 per Evatt. However, the legislation in doubt was *not* re-enacted after passage of the amendment. When the Government introduced the *Social Services Consolidation Bill 1947 (Cth)* to consolidate social welfare legislation, no reference was made to a constitutional need to do so: Commonwealth, Senate, *Parliamentary Debates*, Vol 192 (15 May 1947) at 2410-2423 per McKenna. But perhaps the government was simply working on the assumption that until the legislation was *declared* invalid, it could be presumed valid, and there was no need to re-enact it.

subsequent Parliaments to legislate, or to alter the doctrine of Parliamentary supremacy itself.⁶ This version of the norm of Parliamentary supremacy escapes the objections outlined above because the norm itself prohibits self-reference, and therefore amendment. However, this norm is not the entirety of Britain's ultimate rule. The doctrine of Parliamentary supremacy, and rules derived from it, do not exhaustively indicate validity. Further norms, designating this or that person as the monarch are also required. In any case, the doctrine is evidently inapplicable to Australia where Parliament's failure to follow constitutive rules, as amended, is a well-established ground for judicial review.⁷

Thus the Australian Constitution is not sovereign in its current form. It does not exhaustively determine legal validity:

- the Constitution *in its current form* is not the only determinant of *present* validity; and
- the terms of the Constitution are not determined by the Constitution; nor are they simply unquestionable facts of social practice; but they are determined by reference to past acts and the form of the legal system in the past.

The view that the Constitution alone is Australia's ultimate rule is very similar to the view that the Constitution is authoritative simply because of its continued acceptance [4.1.2]. Both views refuse to examine the historical reasons for that acceptance. Both views ignore that the precise content of the Constitution is identified by reference to legal norms and acts which occurred *before* the Constitution existed.

4.1.2 Identifying law by acceptance of the rule of recognition

Although Hart accepted the continuity of law *under* different constitutional regimes,⁸ he denied the continuity of law *between* different constitutional regimes. Rather, he claimed that there is no point in looking "behind" the social acceptance of a rule of recognition: mere acceptance defines the rule of recognition, and "we are brought to a stop in inquiries concerning validity."⁹ Thus he suggested that if the Imperial Parliament creates a new constitution for a colony, then the constitution is "law" because it is accepted in the colony

6. The correct formulation of the doctrine is a matter of debate: see Craig (1991) at 224-232.

7. The situation is less clear in a former colony such as New Zealand without an entrenched Constitution: see Joseph (1989).

8. Hart (1983) at 362-363.

9. Hart (1994) at 107.

rather than because it has the historical authority of the Imperial Parliament.¹⁰ This analysis was implicitly accepted by Zines, who argued that:

From the viewpoint of legal theory, however, there was no necessity to provide any norm higher than the Constitution and other accompanying instruments, such as the *Australia Act*. It would be sufficient to conclude that the Constitution *was* law because it was enacted by the British Parliament. It is *now* law because it is accepted by the Australian people as their framework of government. In other words it is our fundamental law and needs no further legal justification.¹¹

However, the analysis which Hart himself applied to rules of law other than the rule of recognition, applies equally well to constitutional rules. Hart demonstrated that ordinary rules can only be sensibly analysed in terms of the rules of recognition which participants themselves use to determine the content of ordinary rules.¹² This analysis, which Hart applied to law, similarly applies to the change of a rule of recognition. A complete analysis of secondary rules must describe the basis on which participants themselves determine their content. And where power is peacefully transferred, the content of the new constitution is usually determined in accordance with the procedures of the previous constitution, whose validity and force at the time of transition provides the authority for the new constitution.¹³ Thus from a jurisprudential point of view, a regime can base its legal claim to authority to make directives for the future upon the historical directive of a regime which no longer has authority to make new directives.

This historical analysis might be impugned on the basis that if a government lacks authority to make new rules, then directives it made in the past must also now lack authority.¹⁴ However, even after a fundamental constitutional change, most directives made under the previous regime remain valid. For example, laws passed by the Imperial Parliament before Federation continued in force in Australia, although they were not laws passed in accordance with the new constitution.¹⁵ After a constitutional transfer of rule-making power, as with the aftermath of a revolution, the relevant law in many circumstances can only be ascertained by reference to the now supplanted rule of recognition.¹⁶ The previous rule of recognition remains a necessary means to identify the content of currently valid law.

10. Hart (1994) at 120.

11. Zines (1997b) at 93; similarly see Zines (1991) at 27.

12. Hart (1994) at 88-91.

13. This analysis is based on Finnis (1973) at 57-58.

14. See the references in Finnis (1973) at 44, particularly Kelsen (1946) at 117-118; and see *State v Dosso* (1958) discussed in Finnis & Carnegie (1968) at 73-75.

15. *China Ocean* (1979).

Legislation under the later constitutional source could override legislation derived from the earlier constitutional source. But the *subordination* of the earlier legal order does not imply a common *derivation*.

Another objection to this historical analysis is that continuity between constitutions is impossible because a rule cannot provide for its own amendment. But there is no logical bar to self-reference.¹⁷ And legal systems do not possess any special features which prevent self-reference.¹⁸ Certainly many legal systems purport to have self-referring laws.¹⁹ There is no reason to believe that they are ineffective. Of course, it is *possible* for a legal system to include fundamental, self-referential rules which outlaw certain types of self-amendment. However, a legal system need not include such rules. Whether the power of self-amendment is limited will depend on the system itself.

4.1.3 Identifying law by the “historically first Constitution”

The concept of an ultimate rule is intuitively appealing. It is a good first approximation to analyse a legal system as a hierarchy of norms, each justified by a norm higher in the system. However, a more complete analysis accepts that legal systems change over time, *in accordance with historically valid rules*. For this reason, Kelsen carefully defined the ultimate rule of a legal system as the “historically first constitution”, presupposed to be valid by virtue of the *Grundnorm* of the system.²⁰ Whether the constitution *now* includes an amendment depends on whether the amendment was passed in accordance with the constitution *at that time*. The state of the constitution *then* depends on which amendments had been passed in accordance with the constitution at an even earlier time. According to this model, validity is ultimately determined by reference back to the constitution first established by a revolutionary act.

According to the theory, the *Grundnorm* “shifts” in a revolution.²¹ Whether one considers a revolution to have occurred may depend upon point of view. From the point of

16. Hart (1983) at 362-363; Finnis (1973) at 56-57.

17. Indeed self-reference is a powerful device in many logical systems: see generally Hofstadter (1980), particularly at 21-24.

18. Hart (1983) at 170-178; see also Detmold (1985) at 202-207.

19. E.g. *Commonwealth Constitution*, s 128.

20. Kelsen (1945) at 115; Kelsen (1960) at 200-201; Kelsen (1964).

21. Harrison (1944) at 285; Wade (1955) at 188 provide examples of revolutionary shifts in the British legal order. Determining whether a revolution has occurred requires careful analysis: see the controversy outlined below at fn 24 concerning the accession of William and Mary to the throne of the United Kingdom in 1689.

view of the British legal system and the British colonisers, there was no shift in *Grundnorm* when British settlement of Australia occurred in 1788. However, from the point of view of the legal systems of the Aborigines living in Australia at the time, the *Grundnorm* shifted radically.²² The now existing legal system in Australia claims its authority, and therefore inherits a point of view, from the British legal system. From that point of view, no revolution occurred in 1788.

The conventional application of this analysis to Australia is that the *Appropriation Act 1999 [No 1] (Cth)* is valid because it accords with the *Constitution Act 1900 (UK)*, which is valid because passed by the British Houses of Parliament and the Monarch, which were appointed in accordance with the constitutional legislation of the time, whose validity can be traced back to the *Legalisation of the Convention Parliament Act 1689 (UK)*,²³ and the associated acceptance of William and Mary of Orange as Monarchs, in breach of the then existing rules of succession.²⁴ If one accepts that the ultimate rule is the historically first constitution, then the Commonwealth Constitution is *not* the legal norm posited by Australia's *Grundnorm*. There is no reason arbitrarily to stop the inquiry (into identifying which rules are valid) at the Constitution as first promulgated. The terms of *that* document were in their turn identified by an Act of the Imperial Parliament, whose authority can be traced back at least as far as the *Legalisation of the Convention Parliament Act 1689*.

4.2 The failure of rules to define law exhaustively

4.2.1 Extra-constitutional norms

In any case, legal systems cannot be comprehensively identified by reference to a single "historically first constitution". Valid laws may have more than one ultimate historical source. For example, it is possible to have a legal system in which legal validity is derived

22. *Walker* (1989) at 84. *Brookfield* (1992) at 166-169 provides a similar analysis of the British colonisation of New Zealand.

23. 1 Will & Mar, c.1.

24. *Brookfield* (1992) at 165 claims that no revolution occurred in the United Kingdom in 1688. He argues that the mere assumption of the throne by William and Mary was not legally prohibited, and of itself conferred legal title to the throne, and thus legitimised the Parliament summoned by them. However, if *Brookfield* is right, until the new monarch is crowned, there is no *legal* means to deduce who is the monarch, or whether rules promulgated by a purported monarch are legally valid. On *Brookfield's* theory, a new *Grundnorm* is established every time a new monarch assumes the throne. *Maitland* (1908) at 252-253, 281-282 contradicts *Brookfield's* claim that succession to the British throne was not governed by legal rules. Three statutes in the time of Henry VIII dealt with succession to the throne; a statute passed in the first year of the reign of Elizabeth I provided that it was treason to deny that an Act of Parliament could settle the succession. Preferable to *Brookfield* is the demonstration of *Maitland*

both from Parliamentary enactments and from custom. The fact that custom is *subordinate* to Parliamentary legislation does not demonstrate that therefore custom is *derived* from legislation. Legislation and custom are *independent* sources. Custom is still significant in Australia. Even at the end of a century of diligent codification, significant areas of law in Australia are governed by common law, derived from custom, rather than statutory enactment. Kelsen's approach to this difficulty was to argue that the *Grundnorm* indicates the validity both of a country's written constitution and of custom.²⁵ However, as Raz pointed out, the *Grundnorm* then merely amounts to a requirement to adhere to the legal system as a whole. The "historically first constitution" cannot be articulated as a discrete, identifiable set of norms, nor does it identify the legal system as such.²⁶

There are subtle examples even in Australia of law derived from more than one fundamental source. Some constitutional requirements are "binding" upon officials - that is the courts claim that officials should obey them. Nevertheless, the courts regard those duties as non-justiciable. An "unlawful" act does *not* necessarily result in "invalidity".²⁷ For example, although the requirements of s 57 of the Commonwealth Constitution are mandatory, the results of a Commonwealth election by double dissolution which purported to rely on s 57 are valid, even if the election was not lawfully authorised by s 57.²⁸ Similarly, the votes of an invalidly elected member of parliament do not impugn the validity of legislation whose passage may have depended upon that member's vote.²⁹ There are similar doctrines in other jurisdictions which distinguish between "unlawful" and "invalid" actions. The New Zealand Court of Appeal decided it would not overturn an election even if legislative requirements concerning the issue of writs had not been complied with.³⁰ The Court held that although the requirement to issue writs was obligatory, failure to comply would not invalidate the election.

What norms do these results suppose? In part legal validity depends upon the principle that a legislative body, once constituted in fact, and in substantial compliance with

(1908) at 283-285 that the succession of William and Mary breached the pre-existing rules of succession.

25. Kelsen (1945) at 126-132.

26. Raz (1983) at 128-129.

27. The distinction between "unlawfulness" and "invalidity" is drawn by Hart (1982) at 225, 241-242.

28. *PMA Case* (1975) at 120 per Barwick CJ, at 156-157 per Gibbs J, at 178 per Stephens J. See also *Clayton* (1960) at 246-248. On the effect of s 57, see [4.1.1].

29. Section 46 of the Constitution contemplates a member sitting despite not being validly elected.

30. *Simpson* (1955).

existing rules, should be able to make valid enactments, whether or not it was constituted in strict compliance with existing rules.³¹ This moral norm is *not* derived from the written Constitution. On the other hand, validity often *does* depend on the written Constitution.

The effect of s 57 illustrates the dual sources of validity. A Parliament may be validly elected after a double dissolution called in purported reliance on s 57, although the facts did not truly amount to a deadlock. Most of the legislation of the newly elected Parliament would be upheld, despite the Governor-General's lack of power to hold the election.³² However, the proposed law which purported to be the trigger for the double dissolution would *not* be upheld, on the basis that it had not complied with s 57.

4.2.2 Continuity despite revolution

Kelsen's historically first constitution also cannot account for the continuity of law despite irregularity. If there is a revolution, the revolutionaries *may* sweep away the entirety of the existing law. But as a general principle, existing laws continue in so far as they are not repealed in accordance with whatever new constitutional norms are established by the revolutionaries. Consequently, the law *now* is determined partly by legislation judged in accordance with the new constitutional norms and partly by legislation judged in accordance with the old constitutional norms. For example, in 1690, the law in Britain was partly determined by legislation assented to by William and Mary, and partly determined by legislation assented to by James II. The law relating to succession, current under James II, was invalid in so far as it denied authority to William and Mary. But other constitutional rules current under James II continued to be used to judge the content of the law. The English legal system thus has at least two fundamental constitutional sources of authority, with different dates and origins: the norm which recognised William and Mary as Monarchs; and the bulk of constitutional law, *including* the recognition of James II as Monarch until 1688. In order to determine the content of the statute book in 1690, a judge, then and now, would need to refer to *both* sets of norms.

The principle is not so obviously applicable to the Restoration of Charles II in 1660 when the invalidity of all of the Acts of Parliament under Cromwell was simply assumed.³³ However, this may be a special case. The Restoration claimed not to be a revolution, but the

31. The principle is based on the desirability of ensuring the continuity of a body able to make routine legislation.

32. *PMA Case* (1975) at 120 per Barwick CJ, at 156-157 per Gibbs J, at 178 per Stephens J

33. Maitland (1908) at 282; Holdsworth (1937) Vol VI at 165-166.

resumption of the legal order interrupted in 1642: according to that pre-existing legal order, the revolutionary acts of the Interregnum were all invalid.

One might deny the authority of pre-revolutionary laws by claiming that their operation depends on the implied imprimatur of the new constitution.³⁴ But as with any implication, this merely states a conclusion: it assumes the existence of additional reasons to generate the implication.

Legal systems do not *invariably* adhere to this principle.³⁵ Changes in constitutional norms do not assume it, and are often careful to provide explicitly which laws continue.³⁶ But whether or not the suggested principle is, as Finnis claimed, truly general, it is an accurate description of the historic operation of the Australian legal system.³⁷ As I will show, there are good reasons to accept the principle.

4.2.3 The morality of continuity

The continued operation of law despite constitutional change, whether “implied” after a revolution (as Kelsen said) or judicially accepted (as Hart said), manifests a general moral principle:

A law once validly brought into being, in accordance with criteria of validity *then in force*, remains valid until *either* it expires according to its own terms or terms implied at its creation, *or* it is repealed in accordance with conditions of repeal in force *at the time of its repeal*.³⁸

Finnis claimed that this general principle is true for any legal system, because any legal system at least claims to provide a guide to present actions on the basis of past decisions.³⁹ A legal system can only serve this function if the above principle applies. To ignore the principle, and the fact that actions in the present are guided by law made in the past, would both be unfair, and erode the gains available from organising a society according to law.⁴⁰

34. Kelsen (1946) at 117-118.

35. See *State v Dosso* (1958) discussed in Finnis & Carnegie (1968) at 73-75.

36. E.g. the elaborate and mutually reinforcing arrangements for the transfer of authority over Hong Kong from the United Kingdom to the Chinese government, conveniently described in *HKSAR v Ma Wai Kwan* (1997). Similarly, a standard provision in the grant of independence to various British dominions preserved the operation of existing UK law: see Halsbury vol 6 (4th ed reissue) at 367-368, n 21. In an Australian context, see ss 106 and 108 of the Commonwealth Constitution, preserving the operation of Imperial law with respect to the States.

37. *China Ocean* (1979) at 212-213 per Stephen J; Lindell (1986) at 31-33.

38. Finnis (1973) at 63 (emphasis in original).

39. Finnis (1973) at 65.

40. Finnis (1973) at 65, 76.

Logically the principle should be accepted by any judge committed to upholding a legal system, because the principle is based on the same values as those which motivate acceptance of a legal system as a guide to decision-making. First, the principle ensures that present uncertainties are dealt with according to a relatively stable reference point. Because this reference point is in the past, it is relatively unaffected by present interests and disputes. Second, the principle provides a means for people to shape and control the framework of their future.⁴¹

4.2.4 Conclusion

The attempt to fix legal validity by reference to a single set of rules resembles Austin's attempt to fix legal validity by reference to a single set of institutions. Both ideas are close approximations to the functioning of a legal system. All other things being equal, there are good reasons to prefer identifying validity by reference to a discrete set of rules or institutions [10.2.4]. However, reality is more complex than either model allows.

It is unwarranted to assume that the valid norms of a legal system must all be traced back to a single source. The original British root of legislative power in fact rests on multiple sources; Australian law is derived from both this forked root of imperial legislative power, and from custom; and Australian constitutional law depends on both the Constitution and supra-constitutional norms not derived from the Constitution. A complete identification of Australian law must include, as well as the Constitution, at least the rules and principles applied by the courts to distinguish between unlawful acts which do and do not result in invalidity. One should also add to this description of Australian law the effect of High Court and other judicial precedents which continue to be followed, even if they are arguably or even clearly inconsistent with the Constitution.

4.3 Identifying Australia's legal system

4.3.1 Fundamental norms in Australia

The following, I suggest, *approximately* articulate the fundamental norms of Australian law:

- (1) obey the common law; except insofar as it is contradicted by (2);

41. Finnis (1980) at 269.

- (1) obey enactments applicable to Australia, and authorised according to the constitutional tradition of the United Kingdom, and sources derived from them; except insofar as they are contradicted by (3) and (4);⁴²
- (1) obey moral norms which are manifestly preferable to the outcomes of (1) and (2), provided that the gains outweigh the problems caused by the resulting lack of authority for other laws derived from (1) and (2);⁴³ except insofar as these moral norms are contradicted by (4)
- (1) obey High Court decisions, except in so far as they are contradicted by (5);
- (1) obey (2) (i.e. enactments of the Imperial Parliament, and sources derived from them) and (3) (i.e. overriding moral considerations) despite (4) (i.e. inconsistent decisions of the High Court) if the rules concerning over-ruling a High Court precedent apply.⁴⁴

This picture of the Australian system of law lacks the elegance of either simple “acceptance” or an historically derived root of power. It is a “marshmallow” positivism in which the fundamental legal norms themselves make moral considerations relevant to the validity of *every* posited rule, although they confine the ambit of those moral considerations.

This picture of the Australian legal system is only an approximation. A more complete picture would need to detail the interconnections between these norms. The High Court’s authority depends on designation of the High Court and its membership in accordance with posited rules derived from the Imperial Parliament. The norms concerning over-ruling are partly posited rules, derived from previous High Court decisions.

These fundamental norms have three qualities. First, they describe, more or less, the *results* of Australia’s legal system, and in particular the behaviour of both officials and individuals. Second, they summarise the norms which participants themselves use to identify

42. Consistently with these rules, from the viewpoint of the Australian political community, in 1986 the Imperial Parliament permanently divested itself of power to make new rules for Australia [5.4].

43. This norm is best regarded as part of the legal system [3.3.1]. The norm ultimately justifies principles such as that Parliament can legislate validly even when summoned improperly: the value of having a rule-making authority capable of regular governance outweighs the value of strict adherence to the Constitution’s text.

44. Harris (1996) suggests that the issues involved in deciding whether to overrule an earlier decision are (1) whether the reasoning of the prior decision failed to consider relevant and compelling reasons, and (2) whether the High Court has a high degree of confidence that the earlier decision was mistaken. Horrigan (1992) provides a more complex set of criteria.

what is “Australian law”. Third, they summarise the norms which participants *ought* to use to identify Australian law.

Ultimately *these* norms, and not others, do and should identify Australian law because of judgments about what that law is *for*. In Chapter 10, I argue that a primary purpose of law is to facilitate schemes of cooperation. In furthering this end, it is desirable to identify a country’s law in terms of continuity, and of hierarchical system [4.2.3, 10.2.4]. I will explain in Chapter 10 why moral participants in a system of law *should* identify Australia’s legal system in the way I have described.

4.3.2 Constitutional rules and fundamental norms

Not all of Australia’s fundamental norms require the application of posited rules. Norms (1), (2) and (4) invoke posited rules. Norm (2) requires the application of statutory texts derived from the Imperial Parliament. To the extent that precedents can provide a guide to action, norms (1) and (4) require the application of posited rules. But norm (3), and to some extent norm (5), also require the application of moral criteria *in every case*.

Nevertheless, the very terms of norms (3) and (5) limit the application of moral criteria. Not every moral judgment about direct reasons is law; moral judgments only result in law if they *also* fulfil the other criteria outline by norms (3) and (5). Norms (3) and (5) suggest that action contrary to a posited rule may nevertheless be according to “law” if the rule is “sufficiently” unjust that judges would not apply it. However, not every action consistent with direct reasons is “law” - for the deviation from direct reasons may not be sufficient that it is justified, or judges would consider it justified, to override the posited norm.

The set of fundamental norms distinguishes between the complete set of Australia’s fundamental norms, and the Australian “Constitution”. Many rules which affect governance in Australia - for example the presumption that an Act not have retrospective effect⁴⁵ - are not derived from the Constitution (which is derived from norm (2)), but from either the common law (norm (1)) or High Court precedent *not* determined by the Constitution (norm (4)). Such rules are often described as “constitutional rules”, although they are not derived from the Constitution or other enactments of the Imperial Parliament.

Obedience to “the Constitution” is usually interpreted as compliance with norm (2) - the textual rules contained in the Constitution. Sometimes it is extended to mean compliance with those textual rules, and any judicial precedents which are consistent with them.

Sometimes obeying “the Constitution” means compliance both with the document’s textual rules and with any judicial precedents - *whether or not they are consistent with the text*. Because precedents might be inconsistent with the text of the Constitution, confusion then arises about whether one is obeying “the Constitution”. It would be clearer if this latter obligation were described as obeying Australia’s “legal system” - i.e. “Australian law”. Furthermore, “law” includes consideration of how subjects expect that judges will treat posited norms including the possibility that judges will treat the posited norm merely as a presumptive reason [3.3.1]. In this thesis I am interested primarily in the first question - when should one obey the textual rules embodied in the Constitution? Obviously the answers to this question are related to the reasons for obeying Australian law. But the authority of the Constitution is distinct from the authority of Australian law as an entire system.

4.4 Legitimacy of a legal system

4.4.1 Raz’s ideal definition of a legitimate regime

This provides a working identification of Australia’s legal system. Both Australia’s legal system and Australia’s Constitution identify norms by their source, and claim that they provide reasons for action. However, the legitimacy and the authority of the Constitution is separate from the legitimacy of the legal system.

When *should* an authoritative regime such as a legal system or a constitution be obeyed? According to Raz’s earlier work, a *regime* has “legitimate authority” if and only if each of its directives meets the normal justification.⁴⁶ In so defining a legitimate regime, Raz attempted to deal with the inconsistency, inevitable in practice, between the expansive claims of a real legal regime and the limited moral force of authority. Legal regimes claim *unlimited legitimate authority* - i.e. that every legal norm meets the normal justification. However a real legal system never fulfils this claim. The rules of a legal system are inevitably over and under inclusive; and a fallible regime inevitably makes *some* poor directives.

Raz asserted that a regime is legitimate if and only if its claim to unlimited authority is true - that is, the normal justification holds for all its directives.⁴⁷ Thus a *directive* is legitimate if in the circumstances of its application it meets the normal justification. A *regime* is legitimate only if all of its directives are legitimate. In effect, therefore, Raz determined the legitimacy of a regime by the sum of the legitimacy of its directives. This concentrates

45. Pearce & Geddes (1996) at 243-244.

46. Raz (1986) at 55-57. On the definition of the “normal justification” see [3.1.2].

attention on particular, and therefore real, decisions.⁴⁸ It makes clear that legitimacy is an ideal, and that regimes may be more or less legitimate.⁴⁹ Raz's ideal definition of "legitimate regime" allows that the weight of the reason to obey a particular illegitimate directive may vary, depending on how closely the regime otherwise approaches to the ideal of being a legitimate regime.

However, Raz's definition of a legitimate regime contradicts ordinary usage, which accepts that imperfect regimes can be "legitimate". Raz's definition of a legitimate regime also fails to reflect how the legitimacy of one directive may provide reasons to obey another, possibly illegitimate, directive. Raz accepted that this consideration is relevant to the obligations to support just institutions and to obey the law, but contended that it is irrelevant to "legitimacy".

Raz's definition of legitimacy is particularly difficult to apply to constitutional rules. The primary function of most constitutional rules is to govern the creation of further laws. On Raz's definition, the legitimacy of a constitutional rule varies depending on whether the application of a law created in accordance with the constitutional rule better accords with direct reasons rather than independent decision making. A constitutional rule would be legitimate if and only if this enquiry - into the legitimacy of particular laws - is itself invariably counter-productive (because those making legal rules in accordance with the constitutional rule invariably have more expertise; or because the cost of independently inquiring into the wisdom of particular laws never justifies the improved result). In practice, it is unlikely that this condition would ever be met. Thus using Raz's definition of legitimacy, *no* real constitutional rule is legitimate.

4.4.2 Setting a lower threshold for a regime's legitimacy

In later work, Raz asserted that a regime is legitimate if its directives are "on the whole wise and morally sound".⁵⁰ He defined a "constitution" - a set of constitutional rules - as legitimate if it facilitates worth-while coordination, and is within acceptable moral boundaries.⁵¹ Is this the right threshold for legitimacy? Can we be more precise than the

47. Raz (1986) at 70-80.

48. Raz (1986) at 72-74.

49. Raz (1986) at 77, 104.

50. Raz (1996) at 11.

51. Raz (1998) at 174-176.

observation that a legitimate regime makes directives which are “on the whole” wise and good?

There are more specific ways to define a “legitimate” regime. One might define a regime as legitimate if there is a conclusive reason to obey all of its directives (this includes obedience for collateral rather than direct reasons); or if there is a conclusive reason to obey directives to the extent that disobedience would undermine the system’s capacity to promote other desirable aims; or if there is a *prima facie* reason⁵² to obey all of its directives, or if there is a *prima facie* reason to obey directives to the extent that disobedience would undermine the system’s capacity to promote other desirable aims.⁵³ Each of these alternative definitions incorporates collateral obligations in assessing legitimacy, and so provides a closer link between legitimacy and the moral obligation to obey. Which of them is best suited to our purposes?

4.4.3 Legitimacy and collateral obligation

The concept of a legitimate regime should be defined so as to be useful to practical reasoning about government and obligations of obedience. The crucial question for practical reasoning is, when is it morally desirable to promote obedience to a regime with *de facto* authority? A regime is important to practical reasoning - and therefore we should call it “legitimate” - when it creates a conclusive obligation to promote the regime in general even if it is possible that there are conclusive reasons to disobey particular misguided directives.

52. Here and elsewhere I use “*prima facie* reason” to mean a reason which, in the absence of other reasons, would be *sufficient* for action. This accords with the legal usage of *prima facie*. A *prima facie* case is not merely one which includes *some* reasons for thinking that the plaintiff will win. It is a case which, in the absence of other reasons would be *sufficient* for the plaintiff to win. As this is the idea usually conjured up by the phrase “*prima facie*” I shall endeavour to restrict my use of it accordingly. One could object that if p is not sufficient to motivate X to ϕ , then it is not a “reason”. But we would then need a vocabulary to describe things which *contribute* towards reasons for action but which individually are not sufficient to motivate action. It is less cumbersome to define “reason” more generally, and allow that not every reason is sufficient for action in the absence of contrary reasons.

However, cf Raz (1975) at 27 defining a *prima facie* reason as any reason which is not conclusive. See also Searle (1978) criticising any use of the term *prima facie*, but conceding that there is a distinction between assertions that reasons for action exist, and statements about what we ought to do all things considered.

53. One can also construct *procedural* definitions of legitimacy, such as that a regime is legitimate if it provides a procedural assurance that a sufficiently impartial body has attempted to assess that the directives of the regime do not infringe basic human rights: Barnett (1996) at 153. Baldwin (1995) at 42-47 claims that a regime’s legitimacy depends on some unspecified combination of (1) a mandate from a democratic institution, (2) accountability to a democratic institution, (3) processes which imply a respect for individuals and fairness, (4) expertise (but only in relation to technical questions), and (5) efficiency. However, procedural definitions must ultimately rest on the claim that the procedure they prescribe is more likely to result in substantively worthwhile results.

Legitimacy then depends on whether disobedience would undesirably undermine the authority of the directives of the regime. If a regime's other directives are wicked, then there is no point in encouraging others to use the regime to guide their conduct. The obligation to obey misguided directives will only arise if obedience by all to all of the directives of that regime would result in morally better outcomes than everyone treating the directives as morally irrelevant,⁵⁴ or in selectively obeying only those directives which also belong to some potential alternative, disjoint, and wiser regime. If it would be better to work towards the discontinuous creation of an alternative authoritative regime, then there is little virtue in promoting obedience to the current regime.⁵⁵ In other words, a regime will be legitimate if the benefits of revolution (essentially the improvement in authoritative directives as a result of revolution rather than any achievable evolutionary change) exceed the costs of revolution.⁵⁶

4.4.4 Legitimacy and revolution

This analysis suggests a connection between legitimacy and the moral desirability of revolution. Obedience to an authoritative regime is undesirable, and hence the regime is illegitimate, if the uncertainty, disruption, and potential evils done during a revolution are outweighed by the improvements of a new, disjoint, and achievable authoritative regime. The potential advantages of a new regime may include both improvements in coordination, more effective and better directed coercion to promote desirable behaviour, and reductions in the abuse of authority contrary to the common good. Although these criteria are vague in their application, at least they mark the parameters for debate.

However, without refinement, this definition suggests that regimes are legitimate if they are backed by large coercive forces. Attempted revolution against an oppressive regime might well lead to widespread violence, increased repression and revolutionary failure. Were the regimes of Eastern Europe before 1989 "legitimate", even though they were propped up merely by the threat of Soviet military force? Such a definition of legitimacy would also conflict unacceptably with common usage.

54. Considering directives to be morally irrelevant is not necessarily the same as ignoring them. A person might ignore directives for morally important decisions, but use them as a guide to arbitrary choices: see Finnis (1980) at 284-286.

55. Cf Soper (1987) at 153 who suggests that a regime is legitimate if it is preferable to anarchy, and those who accept and enforce the laws *believe* they are in the interests of all. This definition makes almost *any* regime legitimate: for almost any regime is preferable to anarchy, and the mere *belief* of its rulers does not provide any guarantee that the regime will actually promote the interests of all.

56. The considerations involved are all moral norms: their interaction may be more complex than a simple "balancing" of interests which the language of "weighting" may suggest.

If we are to link the legitimacy of a regime - and therefore its constitution - to the desirability of revolution, such coercive considerations must be excluded. At the same time, we should exclude consideration of the uncertainty and instability generated by revolution even against a liberal regime.

This problem is similar to that raised in deciding on the legitimacy of a directive. The prudence of obeying a bad law to avoid the costs of coercion is not relevant to the morality of obedience to the directive.⁵⁷ By contrast, collateral considerations about the desirability of maintaining the overall system *do* provide moral reasons to obey a law which conflicts with the direct reasons applicable to the situation.⁵⁸

Similarly, the prudence of avoiding unjustified coercion is not relevant to the morality of obedience to a regime. The moral considerations relevant to determining the legitimacy of a regime are the uncertainty - and in particular the temporary loss of coordination - which would accompany revolution even in a society where those individuals controlling resources and the means of coercion did not attempt to preserve existing authoritative structures through coercion. In these circumstances, there would still be substantial costs as the processes of revolution unsettled the location of authority, and so decreased opportunities for coordination.

Thus a regime is truly legitimate if the costs which would be experienced in a revolution even without coercion to obey the unjustified aspects of the authoritative order outweigh the advantages to be gained through the likely improvement in authoritative rules. This definition accords with Raz's later definition of a legitimate regime as one whose directives are "on the whole wise and sound", and his earlier claim that we should support the institutions of a "just" state,⁵⁹ a "reasonably just government",⁶⁰ and a "relatively just government".⁶¹ In a reasonably just state, the advantages through "more just" constitutional arrangements are often highly speculative, and are unlikely to outweigh the difficulties experienced when the location of authority is not settled by authority.

57. Raz (1983) at 242-244 separates "prudential reasons" for obedience from "moral reasons", although at this point he does not distinguish between the moral status of the desire to avoid coercion, and the value of obedience to a rule so as to promote obedience to the system generally.

58. See Finnis (1980) at 354 who separates obligations into (i) liability to sanction; (ii) liability to legal sanction after taking into account the permeability of legal rules to moral considerations; (iii) moral obligation to obey a *particular* law; and (iv) moral obligation, after considering "collateral" considerations.

59. Raz (1986) at 78, 80.

60. Raz (1986) at 92.

61. Raz (1986) at 103.

4.4.5 Defining revolution

I defined revolution as “subverting the regime”. But this is itself a vague test. Not all acts of disobedience to a regime are “revolutions”. Almost any breach of a norm of an authoritative system alters to some extent the authority of those norms which identify that system [3.3.3].

It is particularly difficult to characterise disobedience *by a judge* as revolution against a legal system. A rule enforced by the judiciary will usually continue to be enforced, even if the initial decision was inconsistent with the previously prevalent norms for identifying law. The judicial decision effectively changes the content of the rule of recognition. For example, in 1900, Australia’s fundamental norms recognised the rule in the Constitution that the Inter-State Commission has “powers of adjudication”.⁶² The High Court subsequently denied the Commission powers of “judicial adjudication”, and confined it to “administrative adjudication”.⁶³ Isaacs J defined “administrative adjudication” as “a well considered Statesmanlike opinion ... not measurable by any legal standard”.⁶⁴ It is difficult to reconcile this decision with the Constitution’s text. (Is a “Statesmanlike opinion” really “adjudication”?). It is equally difficult to believe that allowing the Interstate Commission to make conclusive findings of fact would have been such a bad result as to justify undermining the authority of the Constitution’s text. The *content* of the previous fundamental norms (“except where the results are unacceptably bad, conform to the Constitution”) became “except where the results are unacceptably bad, conform to the Constitution, except that the Inter-State Commission does not have powers of judicial adjudication.” Judicial action inconsistent with existing law undermines confidence that other norms of the existing regime are indeed exclusory and conclusive reasons for action. Nevertheless, such judicial action is rarely described as “revolutionary”.⁶⁵

Thus an act inconsistent with the existing legal system alters the system itself. The extent of that alteration depends on whether the act implies that the authorising fundamental norm has no further operation, a restricted operation, or an almost unchanged operation apart

62. *Commonwealth Constitution*, s 101.

63. *Wheat Case* (1915).

64. *Wheat Case* (1915) at 91 per Isaacs J.

65. A judgment inconsistent with the Constitution’s text might not be contrary to “law” if the judgment accords with moral norms so important that they justify undermining the authority of the Constitution’s text [4.3.1]. It will seldom be possible to demonstrate convincingly the application of such moral norms to a particular situations, and their importance relative to the value of preserving the authority of a

from a singular application [3.3.3]. Not every such alteration to a legal system amounts to a “revolution”. Even an unlawful change in government might not amount to a revolution. For example, in Australia, a double dissolution election might be held even though the requisite conditions for holding such an election had not been fulfilled.⁶⁶ Such a change in government would not be labelled as a “revolution”. Conversely a “revolution” *can* occur even if *some* of the norms of an existing legal system continue in force. A revolution occurs when a nation’s leaders are replaced by a process radically different to existing constitutional rules of succession, even though the new leaders continue to be subject to most of the norms of the old constitution.

These linguistic instincts suggest that the distinction is one of degree. First, how manifest is the contradiction of the fundamental norms: is any attempt to justify the action by previous fundamental norms merely colourable, or a plausible claim? Second, how significant are the breached norms? Does the change significantly reshape how the polity functions, or is the system little altered in practice? The distinction between revolution and mere selective disobedience is a question of degree. Ultimately the distinction is the same as asking whether the new norms are still part of the “same” legal system.⁶⁷

Thus defining legitimacy in terms of revolution still suffers from vagueness, even if it seems more attractive because it appeals to ordinary understandings of “revolution”. The definition is consistent with defining a legitimate regime as a “reasonably just government”. If a regime’s directives deviate substantially from the normal justification, the regime is not “reasonably just”. Similarly, if a regime’s directive deviate substantially from the normal justification, it is likely that one could identify an alternative regime so different that it would lack continuity with the existing regime, and so much better that its adoption would justify the costs of revolution.

4.4.6 Legitimacy and obligation to obey particular directives

If a regime is legitimate, there may nevertheless be conclusive reasons not to obey a particular directive. If a subject can identify a particular directive as foolish, then it might be better for the subject to choose to disobey that directive. If a regime is legitimate, it is

Constitution’s text. For this reason as well, it is difficult to label a judicial decision as unequivocally “revolutionary”.

66. See [4.2.1] on the valid legal consequences of such an unlawful election.

67. See Raz (1970) at 187-189. As Raz (1998) at 191 points out, the identity of legal systems raises very similar issues to the philosophical problem of personal identity: am “I” the same person as “I” was yesterday? See Snowdon (1995).

undesirable to foment revolution (bearing in mind the caveats above), and there is usually sufficient reason not to undermine the regime as such. But all things considered, it may be desirable to disobey a particular misguided directive despite the reduction in the regime's authority, and its capacity to coordinate, provided that the reduction in authority would not amount to a "revolution".

Is there *some* reason to obey *every* directive of a legitimate regime? Raz and Smith claimed that there is no *prima facie* obligation to obey an authoritative directive if the directive is not in fact based on direct reasons, and if disobedience to the directive would not encourage disobedience of other directives.⁶⁸ They identified the "reasons" to obey law as a limited generalisation, subject to an exception. Alternatively one might identify the "reason" to obey law as a broader generalisation subject to contrary reasons. On either identification, the relevant considerations remain the same. Whether one should obey a *particular* directive depends on the likelihood that the directive accords with direct reasons, the likely extent of any deviance from the direct reasons, the likelihood that disobedience will reduce the authority of other norms, the likely extent of any reduction in authority, and the costs of identifying all these probabilities with greater precision.

4.4.7 A definition of legitimate regime

In conclusion, a regime has legitimate authority if it is desirable to promote the regime. This will be so if obedience by all to all directives would result in better outcomes than everyone treating them as morally irrelevant, and if there is no virtue in promoting a disjoint change so significant that it amounts to revolution. This definition of a legitimate regime accounts for the *point* of authority: the claim that there is at least some reason for subjects to consider *all* the directives of an authority in practical reasoning.⁶⁹

This definition of legitimacy respects the distinction in Raz's analysis between the legitimacy of a regime and the legitimacy of a directive. A legitimate regime may issue illegitimate directives. These two aspects of legitimacy must be carefully distinguished. The definition of legitimate authority also does not affect Raz's definition of comparative legitimacy. A regime is *more* legitimate if adherence to its directives approximates more

68. Raz (1995) at 347-350; Smith (1973).

69. This definition leaves open questions about how to judge one outcome as better than another, and the way in which the form of an existing regime may influence the answers accepted within a particular society. Is an outcome "better", for example, if it promotes the general welfare of the many, but enslaves the few? (see Beetham (1991) at 142-145). These issues depend on metaethical theory and the

closely to the direct reasons than adherence to the directives of another regime. “Legitimate” is an adjective like “tall”. Some people are not tall at all; some tall people are *less* tall than others.

Nor does the definition of legitimate regime affect the tension which Raz highlighted between the claims of a regime and its performance. A regime which is legitimate claims unlimited authority, and this claim remains necessarily false: there will inevitably be good reasons not to treat some directives as conclusive reasons for action. This objection is not crucial. Just as a legitimate regime may make *some* illegitimate directives, so it may make *some* invalid claims.

The fact that a regime has *de facto* authority is relevant but not conclusive to its legitimacy. If others (at the moment) obey the regime then it is at least potentially capable of coordinating. But a *de facto* authority capable of coordination may still produce such iniquity that there is no obligation to support the regime.

4.4.8 Does legitimacy imply an obligation to obey?

What is the relationship between “legitimacy”, the state’s right to coerce obedience, and the duty of an individual to obey the law? Sartorius defined a legal system as “legitimate” if there is a duty not to rebel against it.⁷⁰ He argued that it is “too quick” to assume that “authorities have a right to what is necessary for the successful performance of their rightful tasks”.⁷¹ He suggested that individuals might not have a moral obligation to obey the directives of a legitimate regime.

However, this is extremely implausible. If a regime is not only right to demand something, but right to use force to compel dissenters, surely there must be sufficient reasons for subjects to obey?⁷² Given the manner in which I have defined legitimate directives, there is no gap between the right to command and the duty to obey a particular directive. The right to make a particular directive only exists if acting in accordance with the directive is a better approximation to the moral reasons which apply to the subject than if the subject tried to apply those moral reasons directly [3.1.2]. In such circumstances, by definition a subject has moral reason to apply the directive.

extent to which morally right answers exist and are deducible. These issues are beyond the scope of the present enquiry.

70. Sartorius (1987) at 55-56.

71. Sartorius (1987) at 57-58.

72. Finnis (1987) at 72.

Nor is there a gap between the legitimacy of a regime and the duty to obey it. As I have defined it, a regime is legitimate if for an individual there is, overall, a conclusive moral duty to promote obedience to the regime. This duty entails a *prima facie* moral duty to promote obedience by obeying *particular* directives whenever disobedience would undermine the legal system [4.4.4-4.4.7].

A gap might exist if “legitimacy” is defined as the *claim* that there are good reasons to obey the regime.⁷³ Such a definition is plagued by an ambiguity in the word “claim”. A “claim” which states the claimant’s status (as in “to have a claim”) is, by definition, justified. A “claim” which demands that another person act accordingly (as in “to make a claim”) may or may not be justified.⁷⁴ A “claim” which is not ultimately justified does not generate moral reasons for action.⁷⁵ It conflicts unacceptably with common usage to define a government as “legitimate” if it *asserts* its justification, but that justification is not in fact valid. The core idea of legitimacy is the *actual* moral justifiability of a government.

The gap which Sartorius identified exists only between the conclusive moral right of a legitimate regime to command in general, and the merely *prima facie* duty of subjects to obey particular directives. In this way it is plausible to argue that although a regime has a (general) right to command, subjects have no (conclusive) duty to obey (particular) directives. But such an analysis simply muddles the distinction between legitimate directives and a legitimate regime which I have attempted to separate [4.4.7].

The right to command and the duty to obey might separate at another point. Perhaps a regime has a right to impose “purely penal laws”, but subjects are morally merely obliged to pay the penalty rather than to obey.⁷⁶ Does a law which permits parking subject to a £10 fee impose the same moral obligation as a law which forbids parking, and imposes a fine of £10?

73. Sartorius (1987) at 59 may be thinking of this definition: “authority is associated with the legitimate exercise of coercive force because compliance with the norms which are enforced by those in authority is *taken to be* required for the successful completion of a *necessary* task” (emphases added). But at other points Sartorius (1987) at 60-61 seems to think that whether an action is “required” or “necessary” depends on whether it *is* morally desirable. Cf Soper (1987) at 144 who clearly does adopt a definition whereby legitimacy depends on governors making a “good faith effort”, rather than *succeeding*, in governing in the interest of all.

74. Halpin (1997) at 89.

75. Finnis (1987) at 73.

76. Finnis (1987) at 72 links this problem to the question of whether the right to command correlates with a duty to obey.

If so, then the regime has a right to impose duties and coercion, but subjects are merely obliged to pay the penalty, not to comply with the substantive obligation.⁷⁷

Usually the purpose of a penal law is to indicate that the forbidden conduct is undesirable. The prescription of a penalty is merely secondary; an estimate of an appropriate level for retribution, reformation, and deterrence. The penalty is not necessarily an estimate of an appropriate *reparation* - indeed true reparation to those whose interests were impaired by the conduct may not be possible.⁷⁸ The impossibility of true reparation is normally the very reason for *forbidding* conduct rather than merely levying a tax.⁷⁹ Thus if a “purely penal” law is indeed justified - because it is based on the dependent reasons - then the subject’s moral obligation is to avoid the forbidden conduct. Payment of any penalty will not be a fully adequate moral alternative. Thus again there is no gap between the regime’s right to impose a penal law and the subject’s duty to obey it.

4.4.9 Point of view

Is a regime legitimate even if there are some who gain little if any benefit from the regime? Do the neglected homeless have any reason to comply with Australia’s Constitution?

A truly moral perspective considers, and weights equally, the interests of all. Oppression and injustice give both the oppressed *and* everybody else - even the rich - *prima facie* reasons to reject the system which perpetrates them. Even if selfishness tempts us to take a more narrow perspective, the interests of *all* members of a community should be considered in judging the legitimacy of that community’s arrangements.⁸⁰

Thus in judging legitimacy, the interests of all, whether rich or poor, should determine whether an alternative political system - or anarchy - would be more just than the existing system to all members of a society. This judgment must take into account the reality of human selfishness and the inequality it inevitably engenders. A system is legitimate even though it permits some injustice, provided that it is more just than anarchy and every other alternative system as it would operate in practice - subject to the costs of transition to an alternative system.

77. Finnis (1980) at 325-337 discusses the history and solution of the jurisprudential puzzle over “purely penal” laws.

78. Finnis (1980) at 331.

79. Finnis (1980) at 332.

80. Such a balance is traditionally referred to as the “common good” see Finnis (1998) 111-123.

4.5 Legitimacy and democracy

What is the relationship between legitimacy and democracy? A comprehensive justification of democracy is beyond the scope of this thesis. But broadly speaking, whilst arguments for democracy suggest that government would generally be *better* if it were democratic, these arguments do not show that democratic structures are necessary or sufficient for legitimacy.

4.5.1 Instrumental justifications

Democratic government has purely instrumental justifications. Democratic procedures are more likely to discourage, or at least limit, governance in the interest of rulers rather than the ruled. A competitive democratic system is more likely than any other system to create situations in which the self interest of the governors (in being re-elected) will result in the governors also acting in accordance with the wishes (and in the interests) of most people.

Democratic government may reinforce an individual's motivation to obey, and therefore the confidence of others that the regime will be obeyed and hence promote coordinated action.⁸¹ Psychologically, people are more likely to support and therefore obey an institution in which they have "ownership". The justification for authority depends partly on its ability to coordinate and to solve prisoners' dilemma problems [10.2.1-10.2.4]. My reasons for acting in accordance with directive ϕ include a belief that others will do so as well. If others fail to comply, my compliance may be pointless or unfair. If I know that others have "ownership" of the system, and that therefore they are more likely to comply with ϕ , the added confidence in the behaviour of others may create an additional reason for me to comply. This argument does not depend on others' beliefs about consent being well-founded. It depends merely upon a psychological phenomenon that obedience is more likely if people *think* they have good reasons for obedience.

4.5.2 Autonomy

A representative democracy also furthers individual autonomy. Democracy encourages representatives to be concerned about the opinions of individuals; and this encourages individuals both to attempt to shape the opinions of representatives directly, and to attempt to shape the opinions of people at large so as to shape the opinions of representatives indirectly. In either case, individuals have an opportunity to decide what is for the good and to act upon it.

81. Raz (1986) at 89-90.

4.5.3 Constructing personal identity

Political participation also enables increased identification with a community. Provided that independent reasons exist to obey authority, identification is intrinsically valuable because it is a means for persons to give shape and content to their lives.⁸²

How plausible is the value of political identity? Raz drew an analogy between one's attitude to law, and friendship.⁸³ The intrinsic good of friendship requires acting on the basis of reasons which express that relationship.⁸⁴ Just as one can choose to have (or not to have) friends, one can choose to "trust" (or not to trust) the law.⁸⁵ Assuming the government is reasonably just,⁸⁶ choosing to trust the law is one means of defining part of one's identity.⁸⁷ Furthermore, the attitude of trust (which is *constituted* by its expression) is intrinsically valuable.⁸⁸ Thus those who actively consent to a constitution which creates a reasonably just government have an additional reason to obey the law.

Raz's theory depends on the fairness of the analogy between the relationship of two friends and the relationship between citizen and government. But while friendship involves interaction between two specified individuals, politics involves interaction between a person and the shifting structures and schemes of government. And whereas it is relatively easy to see an intrinsic value to friendship, it is less easy to see an intrinsic value in participating in a political community and its legal institutions.⁸⁹ In any event, as Greenawalt pointed out, the obligations entailed are necessarily weak and may logically be confined to specific aspects of the law.⁹⁰

4.5.4 Respect for others

Waldron claimed that we should use majoritarian democratic processes to resolve reasonable disagreements because this shows "respect" for the reasonableness of others'

82. Raz (1986) at 87, 91.

83. Raz (1983) at 250-261; Raz (1995) at 366-369.

84. Raz (1983) at 255.

85. Raz (1983) expresses the concept in terms of "having respect for" the law: Raz (1995) explicitly equates this with "trust".

86. Raz (1983) at 258-259.

87. Raz (1986) at 98.

88. Raz (1995) at 368-369.

89. Raz (1983) at 259-260 explicitly dissociates respect for law from participation in community.

90. Greenawalt (1987) at 76-77.

views.⁹¹ It does not follow, however, that majoritarian democracy is *necessary* to legitimacy. If there are indeed moral imperatives to act collectively on issues about which there is reasonable disagreement, these imperatives operate irrespective of the decision-making procedure.

4.5.5 Democracy and political obligation

For all these reasons, a democracy will often be a significant improvement on an autocracy. If these improvements outweigh the costs of revolution, the autocracy would be “illegitimate”. But that judgment depends on the qualities of the old autocracy and the proposed democracy. An enlightened despot may well be preferable to mob rule and demagoguery.

The fact that a regime was created by, or employs, democratic processes is not sufficient for its legitimacy. The mere fact that a regime is democratic does not explain why government, and the coercion it usually entails, is morally desirable. Claims about the legitimacy of democracies assume too much of the argument. Democracy is not *sufficient* for legitimacy.

Furthermore, the argument which does justify the legitimacy of some legal regimes [10.2] does not necessarily imply that a legitimate legal system is democratic. Democratic procedures make it more likely that the conditions for legitimacy will be fulfilled. There are invariably reasons to work *within* a legal system to promote democratic structures. But there may or may not be sufficient reasons to foment revolution an autocracy to create a new democratic regime. Democracy is not *necessary* to legitimacy.

This result may disappoint those who believe that democracy is inherently legitimate. But as a definition it has significant advantages. A definition of legitimacy which concentrates on outcomes, and the benefits which a regime provides to individuals, provides a basis for criticising the rhetoric of elite groups who use catch-cries of “democracy” to defend a system which though democratic in form, in fact principally serves their interests.

The definition of legitimacy which I have provided also explains legitimacy in federations. Federal institutions almost invariably provide some voters (usually those in small states) with marginally more influence *per capita* than other voters. If federal structures ultimately lead to better government, then they are legitimate, despite their departure from the “democratic ideal” of perfect voter equality. Similarly, single member electoral systems tend

91. Waldron (1999) at 88-118.

to deviate from the “democratic ideal” of a legislature whose membership exactly reflects the proportion of voter preferences for parties. But such a system may nevertheless be legitimate if it promotes “strong government” not dependent on a coalition of a number of parties, and if “strong government” is indeed more likely to make decisions for the common good.⁹²

4.6 Conclusion

4.6.1 Authority and sovereignty

We can now attempt to unify Raz’s theory of authority and Hart’s criticisms of sovereignty. Rules have legal authority if they are part of a legal system which is generally obeyed, and obedience to which is claimed to accord better with direct reasons than independent decision-making. What “counts” as an authoritative rule will usually itself be identified by an authoritative posited rule of the legal system.

An authoritative regime is legitimate if there is a *prima facie* moral obligation not to undermine the regime. Usually there are *prima facie* reasons to obey particular directives. There is a conclusive moral obligation to obey if obedience to that directive is more likely to accord better with direct reasons than independent decision-making.

Neither description nor justification of authority relies on anybody’s command. The developing claim of analytical jurisprudence is that “law”, and any moral obligation to obey it, are separate from the “will of a sovereign”.

4.6.2 Legitimacy of a Constitution

Given my description of authority, of the Australian legal system, and of legitimacy, what “authority” and “legitimacy” might the Australian Constitution possess? For the “Constitution” is merely *part* of Australia’s “legal system”.

A regime has legal authority if it provides reasons for action which are generally complied with, and if it claims that there are moral reasons for subjects to comply [3.1.1]. The Constitution is often presented as such a regime. Even though the occasional judicial action contrary to the text of the Constitution may be legitimate [4.3.1, 10.3.3-10.3.4], judges

92. The most plausible argument for the moral desirability of a succession of strong but different governments is that a government controlled by a party opposed to its predecessor will be more ready to abandon bad policies to which its predecessor was committed because of the history of their adoption. A government which starts a war is rarely able to abandon it - for that would be generally perceived as an admission that the original entry into the war was misconceived, and electoral defeat would be all but inevitable. By contrast, the successor to such a regime, provided that it does not share power with any political party which was involved in the original decision, can admit that the original decision was mistaken and abandon the war without any loss of political capital or electoral appeal.

are reluctant to confess that their decisions are not derived from the Constitution [10.3.7]. Usually the rules contained in the Constitution's text are treated as conclusive legal reasons for action. Judges treat them as *at least* presumptive reasons for action.

The legal reason for the Constitution's own legal authority is the Constitution's derivation from previous legal authority, the Imperial Parliament. I will investigate this claim in the next Chapter. But what is the *moral* justification for the Constitution's legal authority?

Even if it is only a subset of Australia's legal regime, the Constitution itself is a coherent regime of directives. According to the analysis of this Chapter, the Constitution would be "legitimate" if there were conclusive reasons not to seek reform, through processes inconsistent with those permitted by the Constitution, and so radical that the reform would be seen as a "revolution". I will investigate these reasons further in Chapter 10.

However, other reasons for the Constitution's legitimacy have been suggested. There may be an obligation to obey the Australian Constitution because it embodies the will of the People (Chapter 6), the will of the Founders (Chapter 7), a federal compact (Chapter 8) or some other commitment (Chapter 9). Before explaining why I think that the Constitution is legitimate, I hope to show why these alternative theories are inadequate. I will then suggest that the Constitution has legitimacy simply because it is an important part of Australia's legal system. It is identified as part of that system because of its enactment by the Imperial Parliament. And the Australian legal system is legitimate because it contributes to human flourishing by facilitating coordination to valuable ends.

Chapter 5 - The Imperial Parliament

5.1.1 The traditional claim

Traditionally Australian judges have claimed that the authority of the Commonwealth Constitution is derived from the Imperial Parliament.¹ A brief paragraph in Quick and Garran simply asserted that the powers of the Commonwealth Parliament are “delegated and derived from the British Parliament”.²

Moore expanded at greater length:

The mode in which the Commonwealth came into being leaves no room for doubt or speculation as to the theoretical origin or legal foundation of the Commonwealth and the Constitution. The establishment of the Commonwealth is no ‘act of State’ transcending the limit of legal inquiry; it is an act of law performed under the authority of the acknowledged political superior. The Constitution is first and foremost *a law* declared by the Imperial Parliament to be ‘binding on the Courts, Judges and people of every State and of every part of the Commonwealth’ (sec v). The formal source for the Constitution being acknowledged, its historical sources may be recognised without any fear of impairing the stability of the union. ... In the Commonwealth the legal basis of the union makes it possible to acknowledge frankly the agreement behind it. The people do not affect to ordain and establish; they have, as people of the several Colonies, agreed to unite, and in the making of that agreement the most scrupulous care was taken to make the popular participation a reality and not a fiction. ... The emphasis of ‘the people’ both in the preamble and in sec iii indicates the democratic origin of the Commonwealth and foreshadows the nature of its Constitution.³

Even Clark, sometimes claimed as a republican,⁴ accepted that “All the acts of the Imperial Parliament ... proceed from the same legal source as that from which the Constitution of the Commonwealth derives its authority”. It followed, therefore, that other Imperial Acts were as binding on Australian courts as the Constitution.⁵

Nor is this view confined to the early years of Federation. For example, in *Kirmani v Captain Cook Cruises* Dawson J said:

[T]he supremacy of the Imperial Parliament as a matter of constitutional theory and, in a much modified way, as a matter of constitutional practice, still remains an important part of our legal system. Not only does the Constitution of this country derive its authority from an Act of the Imperial Parliament but the Statute of Westminster itself is reliant upon the power of that Parliament for its operation.⁶

As recently as 1992, Dawson J reaffirmed in *Australian Capital Television* that:

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1. Thomson (1985) at 1199; Lindell (1986) at 32-33.
 2. Quick & Garran (1901) at 300; but cf their conclusion at 285, that the Constitution “is founded on the will of the people whom it is designed to united and govern”, discussed below at [6.1.3].
 3. Moore (1910) at 66-67.
 4. Williams (1995c).
 5. Clark (1905) at 299-300.

[T]he legal foundation of the Constitution is the Act itself which was passed and came into force in accordance with antecedent law. And the Constitution is itself a law declared by the Imperial Parliament to be 'binding on the courts, judges, and people of every State of every part of the Commonwealth'.⁷ It does not purport to obtain its force from any power residing in the people to constitute a government, nor does it involve any notion of the delegation of power by the people such as forms part of American constitutional doctrine. The words in the United States Constitution 'We the People of the United States ... do ordain and establish this Constitution for the United State of America' find no counterpart in the Australian Constitution; indeed, such words would entirely belie the manner of its foundation.⁸

5.2 Historical and current authority

However, in determining which sources have authority, one must distinguish between a source which had authority at some time in the past, and a source which has authority in the present. For example, before Federation (and in some respects thereafter) the Imperial Parliament had legal authority in Australia - *de iure* and *de facto* power to make new directives which were considered pre-emptive - or more accurately, presumptive - reasons for action. Nevertheless, the UK Parliament now lacks current legal authority in Australia - legislation which it purported to make today for Australia would, as a matter of Australian law, be invalid.

5.2.1 Current authority of Imperial Parliament

It is highly improbable that an Australian court today would implement a new directive of the UK Parliament as such. The only foreseeable exception is if the court considered that the legislation resolved some constitutional paradox, and had been actively sought by Australian representatives.⁹ In *Kirmani*, before the *Australia Acts*¹⁰ expressly terminated the authority of the UK Parliament to legislate for Australia, Deane J adverted to the possibility of disobedience to UK legislation:

It may, however, be necessary at some future time to consider whether traditional legal theory can properly be regarded as providing an adequate explanation of the process which culminated in the acquisition by Australia of full "independence and Sovereignty". Plainly, there is something to be said for the view that any explanation of the legal nature of that process is incomplete if it fails to acknowledge and examine the relevance and importance, under both international law and internal law, of that social compact, of those international agreements, of the "established constitutional position" to which the Statute of Westminster expressly refers and of international recognition of Australia as an independent and sovereign State whose only *de jure* Government is that which is locally based. Those questions could become of some practical importance if the Parliament of the United Kingdom were, for

6. *Kirmani* (1985) at 458 per Dawson J.

7. Covering cl 5 to the Constitution.

8. *Australian Capital Television* (1992) at 181 per Dawson J.

9. The situation in other former British colonies such as Canada is similar: see Oliver (1994) at 896 and the references he cites.

10. I.e. *Australia Act 1986 (Cth)*; *Australia Act 1986 (UK)*.

example, to purport on its own initiative to repeal the provisions of the Constitution or the provisions of the Statute or otherwise to legislate for Australia. Apart from such far-fetched examples however, they lie largely in the realm of theory.¹¹

To take up Deane J's example, imagine a UK Act of Parliament which in an exercise of UK parliamentary supremacy repealed the *Westminster Acts* and the *Australia Acts*,¹² and then purported to regulate conditions of employment in Australian ports. An Australian court would probably declare the UK Act *ultra vires*. This conclusion might rest on the claim that the parliamentary supremacy of the UK Parliament is limited, being permanently bound by the cession of sovereignty in the *Westminster* and *Australia Acts* [5.4]. Alternatively, it might rest on the claim that the court is legally bound to recognise the *de facto* transfer of sovereignty over Australia from UK to Australian institutions. After the *Australia Acts*, it is difficult to imagine *any* UK legislation which would not precipitate a constitutional crisis, and rejection of the UK legislation by Australian courts. If the UK Parliament's jurisdiction has so narrowed that *no* new directive would be treated in Australia as a presumptive reason for action, then the UK Parliament lacks *de facto* authority to make new laws for Australia [3.1.1].

5.2.2 Consequences of the Imperial Parliament's lack of current authority

Does this lack of current authority to make new law imply that the Australian law in force, and in particular Australian constitutional law, is no longer derived from the authority of the Imperial Parliament? Murphy J asserted that:

The original authority for our Constitution was the United Kingdom Parliament, but the existing authority is its continuing acceptance by the Australian people.¹³

More recently, Finn noted that the termination of the power of the United Kingdom to legislate for Australia created an "apparent void in our constitutional theory". This void could either be filled by Australian Parliaments, the Constitution, or some new source - and he also suggested "the people" as appropriate.¹⁴

What should we make of this claim that the Imperial Parliament is no longer the source of legal authority for the Australian Constitution? First, the claim may rest on the

11. Kirmani (1985) at 442 per Deane J (citations omitted); see also Detmold (1985) at 99.

12. I refer throughout in this manner to the *Statute of Westminster 1931 (UK)*, *Statute of Westminster Adoption Act 1942 (Cth)*, *Australia Act 1986 (UK)*, *Australia Act 1986 (Cth)*. These Acts were enacted in parallel, often to avoid subtle questions about the precise limits of the constitutional power of the Imperial Parliament and the Commonwealth Parliament respectively. I shall usually refer to them collectively, as resolving these questions is not relevant to my inquiry.

13. *Bistrice* (1976) at 566 per Murphy J; see also Zines (1997b) at 93.

14. Finn (1985) at 4.

jurisprudential assumption that a body which lacks authority to legislate in the present cannot provide authority for legislation it made in the past. Secondly, the claim may be that some revolution has occurred to break at least partly with the authority of the past and substitute a new legal regime unauthorised by its predecessor. Finally, the claim may be a moral one: that whereas previously obedience to the Imperial Parliament was a good reason for action, today only the Australian people can legitimately authorise a government. I shall discuss the insurmountable problems with each of these views in the remainder of this chapter

5.3 Revoking authority in jurisprudential theory

One basis for the claim that the United Kingdom Parliament is no longer authority for the Australian Constitution rests on the theory that if a regime cannot make *new* laws, it follows that laws the regime made in the past cease to rely on the regime's authority. In particular, because the United Kingdom Parliament cannot make *new* laws for Australia, it follows that the historical enactment of the Constitution by the Imperial Parliament no longer provides legal authority for the Australian Constitution.

It is commonly assumed that if the authority of the Commonwealth Constitution is *derived* from the Imperial Parliament, it follows that the Constitution is *subordinate* to the Imperial Parliament. The converse is also assumed - if Australia is no longer *subordinate* to the Imperial Parliament, it follows that the authority of the Commonwealth Constitution ceases to be *derived* from the Imperial Parliament. For example, Brennan J accepted that *because the Statute of Westminster conferred independence, the Commonwealth Parliament was no longer "sustained by a stream of power flowing from a higher imperial source."*¹⁵

As the discussion in Chapter 4 showed, these are unjustifiable assumptions. The old regime may remain the authority for the new, even if the old regime can no longer make new laws [4.1.2, 4.2.2-4.2.3]. The authority for one king is often the rule of succession laid down by his now deceased predecessor, who would manifestly lack the capacity to make new laws. Similarly, a legislature whose authority is *derived* from a source need not remain *subordinate* to that source.¹⁶

The best analysis of Australian constitutional law accepts that the enactments of the Imperial Parliament, valid when done, continue to provide legal authority for the Constitution. The rules of recognition applied by Australian courts are substantially those in the

15. *Kirmani* (1985) at 410 per Brennan J; *Nationwide News* (1992) at 138 per Mason CJ; *Zines* (1991) at 27; *Zines* (1997b) at 93; *Sawyer* (1987) at 71; *Blackshield* (1994a) at 26.

Commonwealth of Australia Constitution Act 1900 (UK), and the *Westminster and Australia Acts*. One can *only* identify the provisions of these documents exhaustively by reference to the enactments of the Imperial Parliament. It follows that their legal authority is derived from the Imperial Parliament. This conclusion holds even if the Imperial Parliament lacks authority to make new laws for Australia.

5.4 Revoking authority under UK law

A second basis for the claim that the Imperial Parliament is no longer authority for the Australian Constitution is the belief that there is a break in the line of authority from Imperial Parliament to Australia's current legal system. This belief makes three assumptions: that the Australian courts would now not apply directly legislation newly passed by the United Kingdom Parliament;¹⁷ that it was beyond the power of the United Kingdom Parliament to authorise this result; and that this fact frees the Australian legal system from its Imperial moorings.

The fact of Australian independence does not necessarily demonstrate a break in authority. A body with authority to legislate may revoke or pass on that authority [4.1.2]. However, it is possible to have a legal system with a fundamental rule which prevents one authoritative regime legally ceding its authority to another. That is the effect of decisions of the Indian Supreme Court that no amendment may alter the "basic structure" or "essential features" of the Indian Constitution.¹⁸ Similarly, it has been argued that s.128 of the Commonwealth Constitution restricts amendments to "alterations", and so prevents certain types of fundamental change.¹⁹ However, there is no logical necessity that a legal system have elements beyond alteration.²⁰ The validity of the claim, that the existence of Australian independence is incompatible with a continuous line of authority from the Imperial Parliament, depends on the particular features of the Imperial legal system.

16. Raz (1983) at 127-128; Marshall (1971) at 63 draws a similar distinction.

17. See [5.2.1]. But note that even if the United Kingdom Parliament lacks authority to legislate directly, Australian judicial decisions might still be influenced by United Kingdom legislation as a result of applying the rules of private international law. That, however, is a different matter to United Kingdom legislation having paramount force.

18. *Kesavananda* (1973), discussed in Lee (1996) at 250-251; see also the authorities in Kirby (1997a) at fn 113.

19. Craven (1986a) at 191-9, *contra* Crawford (1992) at 185-187 (no amendment for secession under s 128); Craven (1989) (possibly no abolition of States under s 128); Lane (1997) at 2, *contra* Crawford (1992) at 185-187 (no amendment of covering clauses under s 128); Craven (1992b) at 34-35, *contra* Winterton (1994) at 122-126 (no abolition of monarchy under s 128).

20. Hart (1994) at 149.

5.4.1 Effect of *Australia Acts*

Thus the claim that there has been a break in authority must first show that the Imperial Parliament was, under its own constitution, incapable of irrevocably ceding legal authority to Australian institutions. This puzzle is *not* solved by asserting that the *Australia Act 1986 (Cth)* deprived the Imperial Parliament of authority over Australia. Crawford argued that the *Australia Act 1986 (Cth)* is effective to prohibit (at least for the purposes of Australian law) the Imperial Parliament from legislating with respect to Australia.²¹ He rested his argument on the incontestable premise that the Imperial Parliament could create a body which could then validly legislate inconsistently with the Imperial Parliament. However, he did not explain how the Imperial Parliament, consistently with limitations preventing it from irrevocably ceding power, could legally create a body which *irrevocably* deprived the Imperial Parliament of power. The principle is encapsulated in the doctrine *nemo dat qui non habet*: a body cannot legally give away legislative power which it does not possess itself. If the Imperial Parliament does not have power irrevocably to deprive *itself* of power, how can it confer such a power on another body? Claims which rest merely upon the purportedly irrevocable conferral of independence by the *Australia Acts* do not solve this problem.

5.4.2 Academic view against UK power to revoke sovereignty

Lumb asserted that Australia could not acquire legislative independence consistently with UK constitutional law.²² This incapacity is not an express (i.e. posited) norm, but a “principle which underlies the fabric of the Constitution”.²³ Lumb rested his theory on Wheare’s assertions that independence could not be attained legally:

Although traditionalists may regret the breaking of a legal link, which in practice means very little, nationalists will welcome a step which places their country’s constitution and laws on a footing comparable to that enjoyed by the other sovereign independent states in the world. It must be expected, therefore, that members of the Commonwealth will, as a rule, take steps quite soon after they achieve their independence through a constitution made in Britain, to embody that constitution and proclaim that independence in a document which they can claim owes its validity and authority to no outside country or institution but to themselves alone.²⁴

However, Wheare cited no authority for his proposition that as a matter of either international or domestic law a country cannot attain independence by operation of law.

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21. Crawford (1992) at 185; Zines (1997) at 303-308 makes a similar argument which is vulnerable to the same objection.
 22. Lumb (1978) at 158; Lumb (1988) at 30. Moshinsky (1989) at 137 makes a similar assumption, also without defending it.
 23. Lumb (1978) at 157.
 24. Wheare (1960) at 112-113; see also at 108.

Similarly, Wade claimed that under the doctrine of parliamentary supremacy, irrevocable independence can only be brought about by revolution:

When sovereignty is relinquished in an atmosphere of harmony, the naked fact of revolution is not so easy to discern beneath its elaborate legal dress. But it must be there just the same.²⁵

However, Wade's argument on this point (as distinct from his wider argument about parliamentary supremacy in general) rested simply upon the *obiter* statement of Lord Sankey in *British Coal* (1935), which is an unpersuasive authority.²⁶

Similarly, Latham claimed that the United Kingdom Parliament retained authority to repeal the constituting statute for a country which adhered to legal continuity.²⁷ He based his views on Dicey's general writing on Parliamentary supremacy, but ignored Dicey's implication to the contrary concerning the grant of independence to a separate state.

5.4.3 Dicean theory accepting revocation of authority

A contrary line of academic writing suggests that the UK doctrine of parliamentary supremacy allowed the UK Parliament to cede power irrevocably over a particular area. In the context of debates over Irish Home Rule, Anson forcefully argued that British authority could be ceded irrevocably.²⁸ An Act in 1783 confirming the grant of independence²⁹ irrevocably ceded authority to independent Ireland, and the union of Ireland with England in 1800 then united two "independent kingdoms".³⁰ The high priest of parliamentary supremacy, Dicey, added a lengthy note to his *Introduction to the Law and Study of the Constitution* which appears to indicate his agreement with Anson's arguments. Dicey claimed that the 1707 Act of Union between England and Scotland demonstrated that the English Parliament could permanently transfer its authority to a UK Parliament.³¹ It follows, therefore, that the UK Parliament could permanently reconstitute itself as English and Scottish Parliaments, thereby ceding unitary legislative authority. A number of other academics support this view.³²

25. Wade (1955) at 191.

26. See below, text accompanying fn 35.

27. Latham (1937) at 530, 590-591.

28. Anson (1886).

29. 23 Geo III c.28.

30. Maitland (1908), probably basing his remarks on Anson (1886).

31. Dicey (1915) at 65-68; this note was added between the second edition (published in 1886) and the third edition (published in 1889); Anson's article appeared in 1886.

32. Evatt (1936) at 309; the authors cited by Winterton (1976) at 602, n 76; Bickovskii (1977) at 468-469; Marshall (1984) at 208-209 - although cf the equivocal statements in Marshall (1957) at 60-75.

5.4.4 Case law on revocation of authority

Both British and Australian judges have in the last century consistently affirmed the general doctrine of parliamentary supremacy - the only judicially enforceable limit to the power of Parliament is that no parliament can bind its successors.³³ Courts have ignored academic dissent.³⁴ However, the cases have seldom addressed the specific question of whether parliament can irrevocably cede authority over a specific territory to another body. One claim is a statement made in *obiter* by Lord Sankey:

It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation it thought fit extending to Canada remains in theory unimpaired: indeed the Imperial parliament could, as a matter of abstract law, repeal or disregard section 4 of the Statute. But that is theory and has no relation to realities.³⁵

However the statute he was considering in that case did *not* purport to transfer authority irrevocably from the Imperial Parliament to Canadian institutions; indeed, until 17 April 1982 the Canadian constitution could *only* be amended by an Act of the Imperial Parliament.

Other judges have not agreed with Lord Sankey. Dixon J accepted that authority could legally be transferred irrevocably. In *Trethowan* he commented on “the incapacity of the British Legislature to limit its own power *otherwise than by transferring a portion or abdicating the whole of its sovereignty*”.³⁶ South African courts have claimed that a grant of independence is irrevocable in the colony’s courts.³⁷

The lack of case law arises from a paradox. In practice, the Imperial Parliament has never tried to revoke a purportedly irrevocable grant of authority to another body. Because it has never done so, the question has never arisen legally.³⁸

5.4.5 Authority as political fact

It is difficult to resolve the debate over whether the Imperial Parliament can irrevocably cede power. There is little case law on parliamentary supremacy, and even less

33. See *Kable* (1996) at 587-590 per Dawson J.

34. Allan (1993), Chs 3, 11; Walker (1985); Joseph (1989); but cf Wade (1955); Winterton (1976); Forsyth (1996) at 139-140.

35. *British Coal* (1935) at 520.

36. *Trethowan* (1931) at 425 (emphasis added); see also Dixon (1936) at 97.

37. *Ndlwana* (1937) at 237; *Harris* (1952) at 467-468.

38. The existence of a constitutional convention to respect purportedly irrevocable grants does not necessarily imply a corresponding legal rule: *Patriation Reference* (1981).

on the particular problem of ceding power. The academic writing on the topic tends towards dogmatism rather than reasoned argument.³⁹

We can at least dispose of one argument: that under UK law authority can only be transferred by revolution because the existence of authority is a political question. For example, in his seminal article on parliamentary supremacy, Wade asserted that:

[T]he seat of sovereign power is not to be discovered by looking at Acts of any Parliament but by looking at the courts and discovering to whom they give their obedience. In the case of peaceful revolutions, as has been pointed out, the issue is obscured by legal camouflage: Acts of Parliament purport to transfer sovereign power and since sovereign power passes at the same time by universal consent, the transfer is ascribed to the Acts. But it has already been seen that this is a defective explanation, for it leaves alive the controversy about the possibility of repeal. That controversy can be resolved only in one way, by recognising that sovereignty is a political fact for which no purely legal authority can be constituted even though an Act of Parliament is passed for that very purpose.⁴⁰

This seems to be influenced by the theory, later expounded by Hart, that legal rules and principles cannot be used to deduce the rule of recognition [4.1.2]. The unacknowledged irony of this position is that it claims that authority depends on what *courts* do; and even in circumstances of high politics, a court is likely to look for legal reasons to justify its decision. Inevitably, the existence of authority can become a legal question. Whilst courts may refuse to review the legality of a generally acknowledged change in authority,⁴¹ other questions can arise which require courts to decide whether a change in authority *should* be acknowledged. This question readily arises if courts are asked to apply new laws passed by a regime which may or may not have continued authority.⁴² In such circumstances, courts cannot avoid deciding whether these laws are valid. Consequently courts (legally and morally) should look to both moral principles and legal acts such as legislation.⁴³ There are good reasons of principle to prefer a theory which analyses the current situation in terms of legal continuity rather than as a revolution, if it is factually equivocal whether a revolution has occurred [4.2.3]. Only if there has been an unequivocal change in authority, contrary to the previous legal order, should courts simply accept it.

The High Court of Australia might be compelled to choose between the claim that legally power remained with Britain, but nevertheless there had been a revolution; and the

39. As Walker (1985) comments.

40. Wade (1955) at 196.

41. *Mabo [No 2]* (1992) at 31-34 per Brennan J, at 77-79, 113-114 per Deane and Gaudron JJ, at 180 per Toohey J.

42. See for example *China Ocean* (1979).

43. Eekelaar (1973); but cf Wade (1955) at 192.

claim that legal power had been ceded irrevocably. The court should choose the latter. Rather than enforcing a theory of absolute parliamentary supremacy for which there is little historical, theoretical or legal support, the Court should adopt a theory of parliamentary supremacy which promotes legal continuity, and thus uphold the legal force of the purported irrevocable conferral of power by the Imperial Parliament. As Harrison commented:

If current legal theory denies the possibility of achieving what is desired as a matter of politics (using that word in its widest sense), it may be that there is some defect in the legal theory. Equally, to say that a thing can be achieved by illegal but not by legal means also argues a defect in the theory.⁴⁴

Legal theory concerning an irrevocable ceding of authority is at best equivocal: in an era of “substance over form” an Australian court should take the opportunity to align legal theory with political reality.⁴⁵

5.4.6 Multiple successors to a supreme Parliament

The paradox of a supreme parliament binding its successors arises because jurisdiction is divided. Properly understood, the doctrine of parliamentary supremacy is that a subsequent parliament may validly legislate inconsistently with its predecessor.⁴⁶ What constitutes the subsequent parliament, however, is designated by its predecessor. The Imperial Parliament which conferred independence on Australia has a number of successors: the UK Parliament, and the parliaments of Australia pursuant to the Commonwealth Constitution. Each of these parliaments may legislate inconsistently with its predecessor. However, the doctrine of parliamentary supremacy does not indicate which if any of the Imperial Parliament’s successors takes precedence over the others. The Imperial Parliament does *not* bind the UK Parliament: UK courts would be legally obliged to enforce a UK Act of Parliament inconsistent with the *Australia Act (UK)*. To this extent the doctrine of *UK* parliamentary supremacy is maintained. But because the Imperial Parliament also conferred supremacy on Australian parliaments subject to the Commonwealth Constitution, Australian courts must enforce Australian legislation, even if it is inconsistent with the legislation of other jurisdictions - including the UK. Until 1986 new UK legislation could apply to Australia as

44. Harrison (1944) at 284; see also Oliver (1994) who reaches a similar conclusion by a similar route.

45. See *Kable* (1996) at 589 per Dawson J.

46. This formulation assumes that the correct view of the doctrine is that Parliament in its original form may irrevocably delegate its authority to Parliament in a new form. There are other analyses. Wade (1955) at 193-194 suggests that Parliament in its original form retains authority even after delegating authority to Parliament in its current form; at any time Parliament in its original form may reassert its supremacy and strip authority from Parliament in its current form. Craig (1991) at 222-223 summarises this debate and the problems with Wade’s view; see also Oliver (1994) who characterises this as the difference between “continuing” and “self-embracing” authority.

part of the law of the UK and as part of the law of Australia. Now UK legislation only applies to Australia as part of the law of the UK.⁴⁷

Some may be uncomfortable with an Australian court ignoring a UK Act of Parliament which a UK court upheld.⁴⁸ However, such a result may occur without a revolution. It is a result of the fact that a legislature may *derive* its authority from some source to which it does not remain *subordinate*.⁴⁹ Hence two legislatures in the present, whose authority has a common root in the past, may create different rules for the same situation, which their respective courts would be obliged to apply. Indeed, this phenomenon can occur *within* Australia if there is a conflict between the legislation of different States.⁵⁰ No jurisprudential paradox arises merely because different courts in different jurisdictions would apply different laws to reach a different legal conclusion about the same facts. This is perfectly consistent with the respective courts and legislatures *deriving* their authority from the same source (namely enactments of the Imperial Parliament); it is legally impossible only if one legislature remains *subordinate* to the other.

The division of one parliament's supremacy between two successors is important. On this basis one can consistently maintain the general doctrine of parliamentary supremacy but allow the irrevocable conferral of authority on an independent legislature. Winterton asked, "If there is one area in which Parliament *can* bind itself and its successors, why should it not be able to do so in others?"⁵¹ The answer is that in this area, Parliament has more than one successor at a particular point in time. Each of these successors may legislate inconsistently with its predecessors, subject to minimal requirements of manner and form.

5.4.7 Delegation to new forms of government

A final argument is that if Australian parliaments were true successors to the plenary power of the Imperial Parliament, they would share its doctrine of parliamentary supremacy, rather than being restricted by the supreme written law of the Commonwealth Constitution. The corollary is that there is only one form of government to which the Imperial Parliament could grant irrevocable independence consistently with parliamentary supremacy.

47. The distinction between legislation "applying" to Australia and legislation "being part of the law of" Australia is drawn in Halsbury, Vol 6 (4th ed reissue) at [1104].

48. Harrison (1944) at 317-318.

49. Raz (1983) at 127-128. See also [4.1.2].

50. E.g. *McKain* (1991).

51. Winterton (1976) at 603.

This problem cannot be solved on the basis that the Imperial Parliament has multiple successors with different points of view. If the Imperial Parliament lacked power to confer irrevocable independence upon a body which does not share its doctrine of parliamentary supremacy, then legislation purporting to do so is invalid, at least in so far as it attempts to prevent repeal. And this is so even from the point of view of an Australian court.

One response is that the Constitution, the *Westminster Acts* and the *Australia Acts* confer authority on various combinations of the Commonwealth Parliament, State Parliaments, and the people voting in referendum. Cumulatively, these bodies have authority to make *any* law, and hence the conferral of authority is consistent with the doctrine. But this analysis would make a mockery of the traditional formulation of the doctrine of *parliamentary* supremacy, which required that one *parliament* always be able to undo its predecessor's handiwork.

It is more satisfactory to propose modifications to our understanding of the content of the doctrine of parliamentary supremacy. If the suggested interpretation is correct, the Imperial Parliament could only irrevocably confer authority on a former colony if it were governed by a unitary Westminster system without an entrenched constitution, and with the same theory of parliamentary supremacy. The conferral of authority on the New Zealand government would therefore be legitimate; the purported conferral of authority on almost every other former UK colony would not be, even if now accepted. A result so radically at odds with both practice and the desirability of the transfer of authority by authoritative means raises at least an argument that the doctrine - never particularly clearly enunciated by the courts - has a different content. This route was adopted in *Harris*. Although it presented little in the way of reasoned argument, the Supreme Court of South Africa asserted that the doctrine does not require that the governments of former colonies take the same form, and adopt the same constitutional theories as the Imperial Parliament.⁵² The better view is that without a break in legal authority, the UK Parliament can irrevocably cede authority over an area to a new constitutional structure.

If the Imperial Parliament did invalidly irrevocably confer power on Australian institutions contrary to the doctrine of parliamentary supremacy, that would constitute a revolution. However, even then the consequences would not be significant. The revolution would be limited merely to abrogating this particular constitutional rule; it would not thereby

52. *Harris* (1952) at 464.

impugn all the other rules whose authority is derived from enactments of the Imperial Parliament [5.5.4].

5.5 An actual Australian revolution

Another basis for claiming that the Imperial Parliament is not authority for the Constitution is to assert that a revolution has in fact occurred in Australia to break with the authority of the past.

5.5.1 Courts may recognise radical break

Common law judges have always recognised a *de facto* change in authority, even if it was inconsistent with existing authoritative rules for a change in sovereignty. The extension of Parliament's authority to ecclesiastical affairs under Henry VIII, the imposition of the Commonwealth and Protectorate in 1649, the Restoration of Charles II in 1660, and the Glorious Revolution in 1688 all involved the imposition of regimes inconsistent with the constitutional rules in force at the time.⁵³ Courts ultimately have no alternative but to conform with a *de facto* authority prepared to reconstitute a judiciary which does not implement its directives, whether or not they have the legal authority of prior regimes.⁵⁴ (Of course, the refusal of the judiciary to support a regime may undermine acceptance of the regime's directives, and hence deprive it of *de facto* authority.⁵⁵)

There are coherent moral justifications for accepting a *de facto* change in authority [10.2.6, 10.3.7]. Ultimately they depend on the arguments which justify organising society by law. However, there are dangers in readily admitting arguments based on necessity rather than authority [10.2.4]. It is an analysis which should be accepted only in the absence of a clear alternative. What evidence is there that a revolution has occurred in Australia?

5.5.2 Does independence imply a radical break?

Murphy J claimed that Australian institutions, and in particular the Constitution, became independent of the Imperial Parliament when those institutions were internationally recognised as the *de facto* government of Australia. For example, in *Kirmani* he wrote that:

Any continuing authority over the Australian people by the British Parliament would be inconsistent with Australia's sovereignty; Australia would not be a legitimate member of the community of nations. ...

53. Harrison (1944) at 285; Wade (1955) at 188-189.

54. O'Brien (1989) at 346; see also Detmold (1985) at 93-95.

55. See Hart (1994) at 122-123, Marshall (1957) at 139-248 describes how the South African Supreme Court in 1952-1956 influenced a government on the edge of imposing a legal order contrary to the existing constitution.

To an independent sovereign nation, another country's legislation is not binding.⁵⁶ It is not clear whether Murphy considered that legitimacy stemmed from the fact of international recognition, from the Australian people, or from some other source. For example, in *Bistrivic* he said that:

The United Kingdom has no legislative or executive authority over Australia (or any part of it). Any authority over the people of a State would be incompatible with the integrity of the Australian nation which is an indissoluble union of the people of the Commonwealth.⁵⁷

The claim that the Constitution's moral authority is derived from the people is the subject of Chapter 6. The claim that international recognition has domestic consequences was not accepted by the other members of the High Court.⁵⁸ International law explicitly disclaims that a nation's international status influences its domestic legal arrangements [2.4.2]. It is coherent both within Anglo-Australian constitutional law, and international law, for one nation with international legal personality to choose to continue to be subject to the legislation of another nation.⁵⁹ And it is clear from the terms of the covering clauses of the *Constitution Act*, the *Westminster Acts*, and the *Australia Acts* that both Australia and Britain intended that some UK legislation - if nothing else the Constitution - would continue to be legally binding in Australia. Murphy J's proposition is no more than an assertion, unsupported by legal theory, rules or practice.

A more subtle claim for a revolution is suggested by Barwick CJ in *China Ocean*:

Nothing took place in 1900 or 1901 in any wise comparable with Art 1 of the Treaty of Paris of 3rd September 1783 between Great Britain and the United States of America. Nor would any of those who were anxious for the formation of the Commonwealth have desired any such provision. There was neither a desire nor an intention to sever relationships with Great Britain by the formation of the Commonwealth. Indeed, it is a notable historical fact that the Statute of Westminster was not adopted by Australia until 1942, and then not without some public dissent.⁶⁰

Unlike the *Statute of Westminster*, the *Australia Acts* do manifest an intention to sever the *future* legal relationship between Great Britain and Australia. However, they do not manifest an intention to sever the *historic* legal relationship. This may be compared with the Treaty of Paris in which Britain *did* acknowledge the authority of the United States government despite the fact that US domestic law did not rely on a continuous chain of authority from the Imperial Parliament. By contrast, the *Australia Acts* clearly manifest an intention that a

56. Kirmani (1985) at 383-384.

57. *Bistrivic* (1976) at 566 per Murphy J.

58. *China Ocean* (1979) at 209-210 per Stephen J.

59. *China Ocean* (1979) at 209-210 per Stephen J.

60. *China Ocean* (1979) at 182 per Barwick CJ.

continuous chain of legal instruments links the Imperial Parliament, the Commonwealth and State Parliaments, and their successors.

5.5.3 No evidence for radical break

There is little other evidence that Australia has undergone a constitutional revolution. There is some judicial consensus that the authority for the Constitution is now derived from the people. But at best this is an argument about the Constitution's moral authority, not its legal authority [6.4]. Those who argue that a peaceful revolution has occurred have not provided any evidence to satisfy the onus upon them to prove that such a momentous event has occurred.

5.5.4 Consequences of a break in authority

Even if an Australian revolution has occurred, the repercussions may not be substantial.

Imagine, for example, that the UK Parliament revoked Australian legislative authority, that *legally* Australian courts were bound to recognise this revocation as valid (contrary to [5.4]), and that nevertheless Australian courts recognised the *de facto* continuance of Australian institutions contrary to the UK law. This disobedience would not necessarily imply an end to all "authority" of the Imperial Parliament. The authority for those rules which the Imperial Parliament had enacted before the revolution, and which were not directly overturned by the revolution, would continue to be their enactment by the Imperial Parliament [4.2.2]. The attainment of Australian independence does not necessarily imply that authority for the entire Australian legal system transfers to another source. The revolution would overturn the legal rule that Australian institutions are subject to the continuing legislative authority of the Imperial Parliament. The Imperial Parliament would cease to provide authority for this rule. But the Acts of the Imperial Parliaments would not cease to provide legal authority for other constitutional rules. Most constitutional rules, including the provisions of the Commonwealth Constitution, could still only be identified by reference to the enactments of the Imperial Parliament. Even Moshinsky, who advocated a revolution for symbolic purposes [5.6.1], recognised that after a revolution, restrictions on manner and form ultimately derived from the Imperial Parliament would remain binding.⁶¹ Historical rules would almost inevitably continue to be relevant because there are powerful moral reasons for

61. Moshinsky (1989) at 152.

preferring to identify current legal validity in terms of historic legal norms, even after a revolution [4.2.3].

Thus a break in the chain of legal authority does not imply that the legal or moral authority for the Constitution *must* be “the people”. Other legal and moral bases for the Constitution exist, and are outlined in Chapter 10. The Constitution can retain moral authority - or legitimacy - even if there is a break in the chain of legal authority.

5.6 Conclusion

5.6.1 Symbolism and Imperial authority

The theory that the Constitution’s legal authority is derived from the Imperial Parliament may be attacked as symbolically inappropriate for Australia. Moshinsky claimed that it is “unsatisfactory” for the British Parliament to provide the legal authority for the Australian Constitution for several reasons.⁶²

- The doctrine treats institutions as simply existing by law, not as agents for the people.
- It is “incongruous” to develop a unique Australian law whilst interpreting a British Act.
- For symbolic reasons, it is inappropriate for Australia to rely on another legislature.
- The legal basis of the Constitution should accord with the political reality of Australian independence.

These objections may have rhetorical appeal. However, they do not survive closer scrutiny.

American constitutional jurisprudence has always regarded legal institutions as delegates of the people.⁶³ However, “the people” lack sufficient moral authority to justify obedience to the Constitution. Institutions such as the High Court are not controlled by the people - they are not, and should not be, the “agents” of the people. Their justification is that they will act better in the interests of the people if they are *not* so controlled. Provided that their directives are a closer approximation to direct reasons, they are more legitimate than the alternatives [3.1.2]. Chapter 6 will show in more detail why authority is not derived from the people, and why it is not even a desirable fiction.

62. Moshinsky (1989) at 135.

63. Dixon (1935).

Developing a “unique Australian law” whilst interpreting a UK Act is “incongruous” only if one assumes that derivation implies subordination [cf 5.3]. It is quite possible to create a unique Australia law even if *one* of its original sources is a UK Act. The existence of this source does not prevent the development of a unique Australian jurisprudence. The influence of Australia’s Imperial legal history is not so much “incongruous” as a matter of fact. We may not like our parents, but denying their influence would be futile. Nor does Australia “rely on another legislature” because the authority of the Constitution is *derived* from Acts of the Imperial Parliament.⁶⁴ “Reliance” suggests that the Constitution’s legitimacy depends on the *continued* goodwill of the UK Parliament. This is not the case. Even if the authority of the Constitution is *derived* from the Imperial Parliament, that does not necessarily imply continued subordination to it.

Finally, there are good reasons for the legal basis of the Constitution to differ from political reality.⁶⁵ The over-riding priority in most situations is for the location of authority to be settled by authoritative rules laid down in the past [10.2.4]. Current political debates can then occur without undermining the certainty which is vital to the effective exercise of authority. Anchored to the past, the legal basis of the Constitution is *likely* to differ from current political reality. The symbolism of *deriving* the Constitution’s authority from another country is only superficially inappropriate. At a more mature level, such a derivation is inevitable. Children are “derived from” their parents. But they often become stronger, more independent and more successful than their forbears.

5.6.2 Legal and moral authority of the Imperial Parliament

The fact that *legal* authority for the Commonwealth Constitution is derived from enactments of the Imperial Parliament does not demonstrate that *moral* reasons to obey the Constitution are also derived from the Imperial Parliament. The legal reasons for obedience may not be the same as the moral reasons for obedience. Even assuming that the will of the people is a sufficient *moral* reason to obey the Constitution, the will of the people could still be a desire to be ruled by whatever legal sources are *legally* defined by the Imperial Parliament. Such an argument is suggested by McHugh J in *McGinty*:

The Constitution is contained in a statute of the United Kingdom Parliament. In the late twentieth century, it may not be palatable to many persons to think that the powers, authorities, immunities and obligations of the federal and State parliaments of Australia derive their legal authority from a statute enacted by the Imperial Parliament, but the enactment of

64. Moshinsky (1989) at 135.

65. Lindell (1986) makes a similar assumption that the legal basis of an institution should correspond with its present political support.

that statute containing the terms of the Constitution is the instrument by which the Australian people have consented to be governed.⁶⁶

This is one way to resolve the apparent paradox alluded to by Mason CJ in *Australian Capital Television*: on the one hand “the Constitution owes its *legal force* to its character as a statute of the Imperial Parliament enacted in the exercise of its legal sovereignty”; and on the other, “the Constitution brought into existence a system of representative government for Australia in which the elected representatives exercise *sovereign power* on behalf of the Australian people.”⁶⁷

The claim that judges should obey the Constitution because it was enacted by the Imperial Parliament is at best a *legal* argument rather than a *moral* argument. Indeed, the *moral* authority of the Constitution *never* rested simply on the fact that it was legally derived from the Imperial Parliament.⁶⁸ A regime has legitimate authority if and only if obedience to its directives would result in better outcomes than treating the directives as morally irrelevant, or selectively obeying only those directives which would belong a disjoint, preferable and alternative regime [4.4]. The historic legal authority of the Imperial Parliament does not of itself demonstrate that directives derived from the UK Parliament, and hence the Constitution, provide better approximations to direct reasons than individual decisions; nor does it show that directives derived from the Imperial Parliament are better than the directives of some alternative regime. A separate argument is required before one can conclude that there was or is a moral duty to obey the legislation of the Imperial Parliament. That argument will be the subject of Chapter 10.

The better analysis of Australia’s legal history is that legal authority for the Commonwealth Constitution continues to be derived from the Imperial Parliament. That is so even though the Imperial Parliament lacks power to make new legislation for Australia. No revolution has occurred. However, the Imperial Parliament does not, and never did, provide sufficient moral reasons for obeying the Constitution.

5.6.3 Australian nationalism

One cannot deny, however, the rhetorical desire to assert that Australia is independent, and that its constitutional law is independent of any other country. This rhetoric is based on

66. *McGinty* (1996) at 230 per McHugh J.

67. *Australian Capital Television* (1992) at 138 per Mason CJ (emphasis added). It may also be possible that this paradox arises because no definition of “sovereignty” can sensibly apply to the people [2.5].

68. Detmold (1985) at 44-58.

the mistaken belief that *derivation* from a source implies *subordination*. As appealing as it may be to a “nationalistic instinct”,⁶⁹ there is no point in founding a national myth on a logical mistake.

The nationalistic interpretation of Australian constitutional law is a relatively modern phenomenon. In 1937 Latham commented that:

Dominions which have never been strongly nationalist, have always looked to the United Kingdom for the formal source of their law. Australia does likewise, not from lack of nationalism, but because Australian nationalism has always been interested rather in the substance than in the trappings and formal guarantees of independence.⁷⁰

Indeed, Australia is relatively distinctive because its institutions can claim historical legal continuity. Despite efforts to discover a revolutionary history for Australia, the reality is consistently one of change according to law - a record envied by many countries which do have a history of revolution.

69. Lee (1988) at 314.

70. Latham (1937) at 526.

Chapter 6 - The People

The idea that legitimacy depends on the “will of the people” has a venerable history. Locke’s “original compact”, Rousseau’s “social contract”, and the Australian High Court’s “popular sovereignty” are various expressions of the same idea: that political obligation is a result of the actual or hypothetical agreement of the subjects themselves. This theory was particularly influential when the United States was founded.¹ It remains the dominant theory there, and so:

“as a *document* the Constitution came from its framers and its elaboration was an event of the greatest historical interest, but as a *law* the Constitution comes from and derives all its force from the people of the United States of this day and hour.”²

But the “will of the people” is not universally accepted as the basis of political legitimacy. As Hume wrote:

Were you to preach, in most parts of the world, that political connexions are founded altogether on voluntary consent or a mutual promise, the magistrate would soon imprison you as seditious for loosening the ties of obedience, if your friends did not before shut you up as delirious for advancing such absurdities.³

This chapter will describe the rise of the theory of popular sovereignty in modern Australia, and reject the claim that the will of the people provides a sufficient moral or legal reason to obey the Constitution. The chapter then outlines the limited relevance of the will of the people in Australian political and legal theory. Finally the chapter considers whether we should adopt the will of the people as a fiction for Australian theory.

6.1 The rise of the Australian theory

6.1.1 Federation

Theories of popular sovereignty were prevalent, albeit not universally accepted, at the time of Federation. These theories gained currency in the decade before Federation. There was a widespread assumption that direct popular democracy would contribute to the legitimacy of the nascent Constitution.

In 1891 Kingston had proposed that constitutional amendments should be approved by referenda.⁴ This proposal, and a proposal that the original adoption of the Constitution

1. Holmes at 207, 215; Morgan (1988) at 122-148, 237-287.

2. Corwin (1925) at 302. Nevertheless there is increasing scepticism in America about theories of popular sovereignty: see Feldman (1992) at 1421-1423; Harris (1992).

3. Hume (1777) at 359.

4. La Nauze (1972) at 26-27.

depend on popular referenda, were rejected both by the Constitutional Committee and on the floor of the Constitutional Convention in 1891.⁵ Instead, the Convention carried Griffith's motion that each colonial Parliament should make provision "for submitting for the approval of the people of the colonies respectively the Constitution".⁶ Griffith envisaged that each colonial Parliament would organise a convention to ratify the Constitution, taking as his model the procedure employed in approving the US Constitution.⁷

As part of his blueprint for a process to lead to Federation, Quick proposed at Corowa in 1893 that the draft constitution should be "submitted by some process of referendum to the verdict of each colony".⁸ This plan was incorporated in the colonial legislation which created subsequent Constitutional Conventions, and provided for referenda on the results. Quick's proposal ultimately resulted in a series of referenda on the Constitution in 1899-1900.

By 1900, rhetoric about "the people" abounded. The delegates of the Australian colonies, sent to London to negotiate with the Colonial Office the passage of the draft Constitution Bill, wrote a memorandum defending their draft against alterations proposed by the Colonial Office. They wrote:

It is the Bill as it now stands, and no other, under which, as the preamble truthfully recites, the people of five loyal Colonies have agreed to unite.... It is that agreement of the people which is the root of the tree of union, and anything which strikes at the root endangers the whole tree.... The votes of the people, affirming [the draft Bill] constituted it the Australian agreement.⁹

However, as the Colonial Office replied:

It cannot fairly be contended that the approval given by the people of the Australian Colonies in favour of the proposals for Federation submitted to them is to be taken as an unqualified and considered ratification of every detail of the Constitution.¹⁰

Nevertheless, a few years later Deakin maintained that:

This Constitution is not the creation of our State Parliaments only, neither is it the creation of the Imperial Parliament only. It draws its authority directly from the electors of the Commonwealth.¹¹

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5. La Nauze (1972) 58-59, 72; Quick & Garran (1901) at 142; *Australasian Convention Debates, Sydney* (1891) at 900-904, 937.
 6. Quick & Garran (1901) at 142.
 7. *Australasian Convention Debates, Sydney* (1891) at 928.
 8. Quick & Garran (1901) at 153. Deakin (1963) at 58 suggests this process was also suggested to Quick by D'Esterre, an active member of the Australian Natives' Association. Maslunka-Matthews (1993) provides a brief summary of the evidence.
 9. Barton et al (1900a) at 13.
 10. Colonial Office (1900) at 76.
 11. Commonwealth, House of Representatives, *Parliamentary Debates* Vol 8 (18 March 1902) at 10967 per Deakin.

6.1.2 Judicial statements

An attempt to rest the Constitution's authority on the will of the people was made within a year of constituting the High Court. Higgins KC, later to be appointed to the Court, claimed in argument before the High Court that "the power of the Commonwealth and the States come from the same source ... viz, the people".¹² In the course of the same argument, Isaacs KC, also later to be appointed to the Court, put the opposing argument, that "The United States Constitution is a grant by the people of the States. There is no power above them." He contrasted this with the Australian Constitution which "is a grant and distribution of powers by the Imperial Parliament."¹³ The Court's decision did not resolve the argument. Griffith CJ refused to decide, on the basis that it could make no difference to the Constitution's interpretation.¹⁴ O'Connor J appears simply to have assumed that the Constitution relied on the authority of the people as he held that the Premiers did not embody the will of the people. Instead, "There is only one way in which the Court can know the will of the Australian people, and that is as it is contained in [the Constitution]."¹⁵ There is a faint echo of this argument in *Bribery Commissioner* (1965). In that case the Privy Council considered restrictions on legislative power imposed by the Ceylonese Constitution, and which could not be amended. The Privy Council held that these constitutional provisions:

represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter se they accepted the Constitution; and these are therefore unalterable under the Constitution.¹⁶

Murphy J was the first judge in modern times to draw consequences from popular sovereignty.¹⁷ In 1976 he claimed that the "existing authority" for the Constitution is "its continuing acceptance by the Australian people".¹⁸ His views rested on the claims that:

- (1) because Australia was an independent sovereign nation, the United Kingdom had no power to pass legislation affecting Australia;
- (1) given this independence, the Constitution's authority could not be derived from the United Kingdom;

12. *Deakin* (1904) at 601. The first judges were appointed to the Court on 24 September 1903 (see Commonwealth, House of Representatives *Parliamentary Debates* Vol 17 (24 September 1903) at 5463); argument in *Deakin* was heard on 16 - 22 August 1904.

13. *Deakin* (1904) at 596.

14. *Deakin* (1904) at 605-606.

15. *Deakin* (1904) at 630.

16. *Bribery Commissioner* (1965) at 193-194.

17. For another description of the rise of the "popular sovereignty" theory in Australia, see Mason (1996c) at 36-39.

- (1) the void could only be filled by the authority of the people.¹⁹

Murphy J's theory was rejected by the remainder of the High Court in *China Ocean* (1979).²⁰ Nevertheless, in *Kirmani* (1985) he reiterated that "the authority for the Australian Constitution [in 1901] and [in the present] is its acceptance by the Australian people".²¹

By then Deane J had been appointed, who was prepared to give the theory a more sympathetic hearing. At his swearing-in, Deane J had claimed that:

The source of law and of judicial power in a true political democracy such as Australia is the people themselves: the governed.²²

Deane J first expressed this view in a judgment in 1983:

The Constitution of Australia was established not pursuant to any compact between the Australian Colonies but, as the preamble of the Constitution emphatically declares, pursuant to the agreement of 'the people' of those Colonies. Pursuant to that agreement, [legislative powers were conferred on the Commonwealth Parliament].²³

But in this latter statement Deane J carefully claimed only that Parliament's powers were *pursuant* to the agreement of the people, not *dependent* on them.

The following year, Deane J advanced a step. In *Metwally* (1984) he said that the "artificial entities", the Commonwealth and the States, "derive their authority" from the people.²⁴ A year later in *Kirmani*, he was more circumspect. He acknowledged that the approach "long accepted" in the High Court was that the authority of the Constitution rests "as a matter of legal theory, wholly upon [its] enactment by the Imperial Parliament as distinct from resting upon a wider foundation which also encompasses the social compact ... which the Constitution ... embodied".²⁵ However, having accepted the existence of the traditional approach, Deane J went on to suggest that it might be necessary to reconsider whether "traditional legal theory" provided an "adequate explanation" of the process whereby

18. *Bisticic* (1976) at 566 per Murphy J.

19. I have already shown that the first two steps were erroneous. First, nothing in international law or the common law prevents the partial grant of independence to a dependent territory, such that the "imperial" country may pass further operative legislation [2.4.2, 5.5.2]. Secondly, even if full independence is conferred so that a former dependent territory is no longer *subordinate* to the Imperial Parliament, the authority for the Constitution may still be *derived* from the Imperial Parliament [5.3].

20. At 209-210 per Stephen J.

21. *Kirmani* (1985) at 383.

22. Deane (1982) at 17-18.

23. *Re Duncan* (1983) at 589-590 per Deane J.

24. *Metwally* (1984) at 476-477 per Deane J.

25. *Kirmani* (1985) at 441-442.

Australia acquired full independence and sovereignty.²⁶ Whatever the legal theory, the *practical* effect of the people's power to amend the Constitution was that "ultimate authority in [Australia] lies with the Australian people".²⁷ There were two implicit claims: the agreement of the people provided the ultimate moral reason for obedience to the Constitution, and the traditional legal reason for obedience (i.e. enactment by the Imperial Parliament) should be supplanted by this moral reason.

In 1988 Deane J went a little further, suggesting that:

"the compact between the Australian people rather than the past authority of the United Kingdom Parliament under the common law, ... offer[s] a more acceptable contemporary explanation of the authority of the basic law of the Constitution."²⁸

That is, the "practical reality" identified in *Kirmani* would be substituted for the traditional explanation as the new "legal theory". Deane J's approach coincided with the conclusion of Lindell's article published in the previous year:

[the Constitution is binding] because of the will and authority of the people. Such an explanation more closely conforms to the present social and political reality and has the advantage of ensuring that the legal explanation for the binding character of the Constitution coincides with popular understanding.²⁹

The theory of a popular compact gathered adherents. In 1992 Deane and Toohey JJ wrote a joint judgment asserting that the "conceptual basis" of the Constitution "was the free agreement of 'the people - all the people - of the federating Colonies'".³⁰ Their claim was based on the preamble to the *Commonwealth of Australia Constitution Act 1900 (UK)*.³¹ The same year, in the first of the "free speech" cases, *Nationwide News*, they claimed that:

the central thesis of the doctrine [of representative government] is that the powers of government belong to, and are derived from, the governed, that is to say, the people of the Commonwealth.³²

In *Australian Capital Television*, decided the same day, Mason CJ introduced a theory of "popular sovereignty". As he put it:

The *Australia Act 1986 (UK)* marked the end of the legal sovereignty of the Imperial Parliament and recognised that ultimate sovereignty rested in the Australian people.³³

26. *Kirmani* (1985) at 442.

27. *Kirmani* (1985) at 442.

28. *Breavington* (1988) at 123 per Deane J; see also at 120 per Deane J.

29. Lindell (1986) at 37.

30. *Leeth* (1992) at 486 per Deane and Toohey JJ.

31. The preamble is in fact highly ambiguous about the conceptual basis of the Constitution: see [1.5].

32. *Nationwide News* (1992) at 72.

33. *Australian Capital Television* (1992) at 138; see also Mason (1993) at 166; Toohey (1993) at 170: "the people of Australia, in adopting a constitution, conferred power to legislate".

Mason CJ thought that as a result of popular sovereignty, members of parliament and Ministers exercised their powers not merely in the interests of the people, but as “representatives of the people”.³⁴ In a speech the following year he summarised this passage as the claim that “sovereignty resides in or derives from the people”.³⁵

It is difficult to pin down Mason CJ’s theory because “sovereignty” is such an ambiguous term [2.5]. His reference to the *Australia Act* suggests that sovereignty may mean merely the ultimate residuary power to make law. Mason CJ’s claim could then be read as no more than the legal truism that because the Imperial Parliament now lacks legal power to legislate for Australia, only referenda and Australian parliaments have that power. In short, popular sovereignty may be merely a description of the people’s role under the Constitution in referenda and electing members of parliament. But this thin reading would not support Mason CJ’s further claim that members of parliament and ministers:

are not only chosen by the people, but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act.³⁶

This further claim does not follow if the “sovereignty of the people” is mere description. Legislators can be elected by the people, and yet have no subsequent responsibility to consider the views of their electors. Indeed, that is the traditional UK constitutional doctrine.³⁷ A responsibility to heed popular views follows only if the legislator’s legitimacy depends not just on being elected in accordance with the Constitution, but also on representing the views of the people. Mason CJ’s claim is logical only if laws made in accordance with the Constitution are legitimate not because that Constitution was posited by the Imperial Parliament, but because the Constitution creates a system in which lawmakers “represent the people”. Mason CJ did not spell out why representing the people is crucial to legitimacy, but presumably Deane J’s theory lurks in the background: legitimacy depends on law - or at least the Constitution - manifesting the “will of the people”.

Gaudron J seemed to sympathise with the theory that the will of the people provides the Constitution’s legitimacy.³⁸ She adverted to the fact that “federal arrangements depend on

34. *Australian Capital Television* (1992) at 138.

35. Mason (1993) at 166.

36. *Australian Capital Television* (1992) at 138.

37. Morgan (1988) at 215. The doctrine was most famously articulated by Burke in a speech to the Electors of Bristol in 1774: see Griffith & Ryle (1989) at 69-71.

38. Williams (1994b) at [73], n 1.

the will of the people”.³⁹ But federal arrangements only “depend” on the people in the sense that “the people” are capable of amending them through s.128. Unlike Mason CJ, Deane and Toohey JJ, she did not argue that the Constitution derives its moral or legal authority from the people. Instead, her reference to the people concerned a completely different issue: the proposition that State political affairs are part of Commonwealth political affairs because they can influence the extent of Commonwealth power through changes resulting from referral or referendum. She did not imply that authority was necessarily derived from the people.

Deane J strengthened both the importance and the content of his concept of “popular sovereignty” in a subsequent free speech case, *Theophanous*.

The present legitimacy of the Constitution as the compact and highest law of our nation lies exclusively in the original adoption (by referenda) and subsequent maintenance (by acquiescence) of its provisions by the people. While they remain unaltered, it is the duty of the courts to observe and apply those provisions.⁴⁰

Furthermore, he explained, popular sovereignty meant that “all powers of government ultimately belong to, and are derived from, the governed or in Madison’s words, that ‘(t)he people, not the government possess the absolute sovereignty””.⁴¹

Toohey J went further in *McGinty* (1996):

The very concept of representative government and representative democracy signifies government by the people through their representatives. This holds the representatives accountable to the people for what they do. Thus the people hold the ultimate sovereignty. In *Nationwide News*, Deane J and I saw the election of members of Parliament as one way in which the ultimate power of governmental control reserved to the people under the Constitution was exercised. We said, advertent to what was said by McTiernan and Jacobs JJ in *McKinlay*: ‘all citizens of the Commonwealth who are not under some special disability are entitled to share equally in the exercise of those ultimate powers of governmental control.’⁴²

It is unclear whether the point of this passage is that representative government and the equal exercise of the powers of governmental control are the *indicia* or the *consequence* of popular sovereignty. In *Leeth*, the joint judgment of Deane and Toohey JJ indicated more clearly that equality was a *consequence* of popular sovereignty.⁴³

In *McGinty* (1996) two more judges accepted that “political and legal sovereignty of Australia now resides in the people of Australia”.⁴⁴ McHugh and Gummow JJ accepted the

39. *Australian Capital Television* (1992) at 216.

40. *Theophanous* (1994) at 171 per Deane J.

41. *Theophanous* (1994) at 180 per Deane J.

42. *McGinty* (1996) at 199.

43. *Leeth* (1992) at 486.

44. *McGinty* (1996) at 230 per McHugh J; similarly at 274-275 per Gummow J.

authority of Mason CJ's judgment in *Australian Capital Television*⁴⁵ that this was the result of the *Australia Acts*. However, both McHugh and Gummow JJ defined sovereignty as merely the ultimate power to amend the Constitution.⁴⁶ If one accepts this definition of sovereignty (not without its own problems), then the effect of the *Australia Acts* is indeed to withdraw sovereignty from the Imperial Parliament [5.4]. However, the mere power to participate in amendment is much less than the claim of Mason CJ, Deane and Toohey JJ, that legitimacy depends on power being derived from the sovereign people.⁴⁷ Not only did McHugh and Gummow JJ redefine sovereignty, they also played down the consequences of popular will for constitutional interpretation. McHugh J considered that the popular consent was merely "to be governed by a constitution enacted by a UK statute."⁴⁸

With the departure of Mason CJ and Deane J from the High Court, the link between legitimacy and popular sovereignty may be weakening. In *Levy*, Kirby J noted the theory that sovereignty resides in the people, and some of the difficulties associated with it, but did not commit himself to it.⁴⁹ Extra-judicially he has not committed himself to the theory,⁵⁰ although his thoughts seem to be moving in that direction.⁵¹ Other recent cases involving implied constitutional freedoms have pointedly not referred to popular will, authority or sovereignty.⁵²

Thus at its zenith in *Australian Capital Television*,⁵³ *Leeth*,⁵⁴ and *Theophanous*,⁵⁵ "popular sovereignty" was the theory that:

- the consent of the people today is a sufficient (and possibly necessary) reason to impose moral and legal obligations to obey the Constitution; and

45. *Australian Capital Television* (1992) at 138.

46. *McGinty* (1996) at 237 per McHugh J; at 274-275 per Gummow J. This definition of sovereignty is discussed at [2.3.4].

47. *Theophanous* (1994) at 180.

48. *McGinty* (1996) at 230.

49. *Levy* (1997) at 283-284.

50. Kirby (1997a).

51. Kirby (1997b).

52. *Langer* (1996), *Levy* (1997), *Kruger* (1997), *Lange* (1997).

53. (1992) per Mason CJ.

54. (1992) per Deane and Toohey JJ.

55. (1994) per Deane J.

- this source of obligation has constitutional consequences; in particular, electoral legislation must preserve popular participation in government, and (according to a few judges) citizens must be treated equally [11.4].

None of the judges supporting these claims remains on the bench. McHugh, Gummow and Gaudron JJ, who do remain, have concentrated merely on the participation of the people in the amendment procedure of s.128. Although they have said that this amounts to popular “sovereignty”, the Governor-General and the Parliament also participate in the amendment process. Presumably, therefore, it is equally appropriate to claim that Australia also has “parliamentary sovereignty”, and even “monarchical sovereignty”. In any case, none of these judges have explicitly claimed that the popular will supplies the Constitution with either moral legitimacy or legal force.

6.1.3 Academic theory

There are suggestions of popular sovereignty in early writing after Federation. Quick and Garran noted that the Constitution “is founded on the will of the people”. Relying on Dicey, they suggested that the people are “sovereign” in the sense that, as a matter of political reality, their will is ultimately obeyed. But in the same passage they added that the Constitution is “clothed with the form of law by an Act of the Imperial Parliament”.⁵⁶ They accepted the *legal* supremacy of the UK Parliament, and contrasted this with the United States where “the political as well as the legal sovereignty of the people” had been accepted since the Declaration of Independence.⁵⁷ In a subsequent passage they declared less equivocally that the Commonwealth’s powers under the Constitution are “delegated by and derived from the UK Parliament”.⁵⁸

Clark may be read as advocating a form of popular sovereignty. In a passage which Deane J quoted at length in *Theophanous*,⁵⁹ he wrote that:

[T]he language of the Constitution must be applied, and hence it must be read and construed, not as containing a declaration of the will and intentions of men long since dead, and who cannot have anticipated the problems that would arise for solution by future generations, but as declaring the will and intentions of the present inheritors and possessors of sovereign power, who maintain the Constitution and have the power to alter it, and who are in the immediate presence of the problems to be solved. It is they who enforce the provisions of the Constitution and make a living force of that which would otherwise be a silent and lifeless document. Every community of men is governed by present possessors of sovereignty and not

56. Quick & Garran (1901) at 285.

57. Quick & Garran (1901) at 285.

58. Quick & Garran (1901) at 300. The senses in which this is still true are discussed in Chapter 5.

59. (1994) at 171-172.

by the commands of men who have ceased to exist. But so long as the present possessors of sovereignty convey their commands in the language of their predecessors, that language must be interpreted by the judiciary consistently with a proper use of it as an intelligible vehicle of the conceptions and intentions of the human mind, and consistently with the historical associations from which particular words and phrases derive the whole of their meaning in juxtaposition with their context. If the present possessors of sovereignty discover that the result so produced is contrary in particular cases to their will in regard to future cases of a like character, they will amend the language which they previously retained as the expression of their will. If they do not amend it they must be presumed to accept the interpretation put upon it by the judiciary as the correct announcement of their present commands.⁶⁰

Interpretation of this passage is difficult because of the ambiguous references to “sovereignty”. The first two thirds of the passage can be read so that “sovereignty” merely means the power to amend the Constitution [2.3.4]. This would not support Deane’s claim that the will of the people supplies the moral reason for obedience. But Clark’s last two sentences do assume that the approval of the current generation is the fundamental moral reason for obedience to the Constitution. Nevertheless, Clark did not accept Deane J’s final step that the *legal* reason for obeying the Constitution is the will of the people. By contrast, Clark explicitly accepted that the *legal* authority for the Constitution was the Imperial Parliament.⁶¹

In 1960 Wheare wrote that:

The Australians might argue that, irrespective of the fact that the Australian Constitution obtained force of law in 1900, through its being enacted by the Parliament of the United Kingdom, it possesses force of law today through its acceptance by Australians for sixty years or more. ...

If by some means the Constitution could be deprived of its quality as a British Act, Australians would still regard it as having force of law. If the Constitution obtained its life in the seed bed at Westminster, and was transplanted to Australia, it has struck root in the Australian soil, and owes its life now to Australia and not to Britain.⁶²

Thus Wheare assumed that continued popular acceptance supplies the Constitution with both legitimacy and legal authority. Academic support for the proposition that popular sovereignty supplies the Constitution with legitimacy has been all but universal since the *Australia Acts* were passed in 1986.⁶³

60. Clark (1905) at 21-22.

61. Clark (1905) at 299-230.

62. Wheare (1960) at 108.

63. Blackshield (1994b) at 240-242, 267-268; Detmold (1985) at 199; Detmold (1994) at 229; Donaghue (1996) at 144-147; Finlay (1982) at 473; Finn (1995); Galligan (1993) at 61; Galligan (1995) at 25-31; Irving (1997) at 113-115; Lavarch (1996) at 17; Lindell (1986) at 37, 49; McDonald (1994) at 161-162; Sawyer (1987) at 71; Wheare (1960) at 108; Williams (1994a) at 95; Williams (1996) at 867-8.

Others have accepted that it is the prevailing legal theory, without necessarily committing themselves to its correctness: e.g. Doyle (1995) at 150-151; Saunders (1998) at 7-8. Fraser (1994), Winterton (1998a) and Zines (1997b) are notable dissentients, although Winterton (1998b) at 74-75 appears to endorse the theory.

6.2 Summary of the problems with popular sovereignty

A number of propositions underlie the thesis of popular sovereignty:

- fact (1) The Constitution is the will of the people.
- moral norm (2) The Constitution should (morally) be obeyed because it is the will of the people.
- legal norm (3) The Constitution should (legally) be obeyed because there is a good moral reason for obedience, namely that it is the will of the people.

Proposition (1) is itself problematic. But even if it is true, the other propositions do not logically follow. Why would the fact of popular will itself entail a moral obligation? Even if it did, proposition (3) would not follow. The *mere* existence of a moral norm does not automatically imply the corresponding legal norm. A clear distinction between moral norms and legal norms is a central aim of legal positivism,⁶⁴ and is conceded by any sophisticated theory of natural law.⁶⁵ The progression from moral norm to legal norm requires more careful argument.

Can any of these links be supported? Before answering, some initial clarifications are required.

First, many of the Australian writers treat popular “sovereignty” and popular “authority” as indistinguishable.⁶⁶ Yet these terms mean different things.⁶⁷ “Sovereignty” problematically connotes a comprehensive power not possessed by actual democratic governments, or any entity of a democratic government. “Authority” is the preferable term because its definition has been developed more precisely, and because this definition is readily applied to the operation of real governments. A regime has *de facto* (i.e. legal) authority if its directives are considered to provide exclusory reasons for action [3.2]. A regime has legitimate authority if compliance with its directives is preferable to undermining the system of *de facto* authority which the regime creates, because compliance will result in subjects complying more closely with the direct reasons which apply to them in the absence of authority [4.4].

64. Hart (1983) at 49-87.

65. Finnis (1996) at 203-205.

66. A rare exception is *Payroll Tax Case* (1971) at 395 per Windeyer J: [in Australia] “there is dual authority but only one sovereignty”.

67. See Chapters 2 and 3.

A second problem lies in shifting definitions of the “will” of the people.⁶⁸ Is a result “willed” if I grudgingly acknowledge that I am unable to prevent it? Or if I cannot be bothered to oppose it? Or if I have better things to do and do not actively think about it either way? These types of will I shall describe as “acquiescence”. Alternatively, “will” might connote some preference that a particular result rather than its alternative occurs. In other words, it might be my “desire”. My “desires” may be satisfied without my participation: I can desire an Australian cricket victory but do no more than read the reports in the newspapers. Finally, “will” might amount to “consent”: a communication made knowing that it will bring about a specific result, and desiring it to do so. The circumstances which amount to acquiescence, desire, and consent are different, as are their normative consequences. Each must be considered separately.

The claims to be explored, therefore, are whether the will of the people exists, and whether there are reasons to act accordingly. The remainder of this chapter will demonstrate that the will of the people cannot provide sufficient reason to obey the Constitution. This is a complex argument, and a road map may be useful.

68. E.g. Galligan (1995) at 29 which simply equates acquiescence with consent.

[6.3] The will of the people does not provide sufficient moral reasons to obey the Constitution. That is, the will of the people does not provide the Constitution with legitimacy.

- (1) If the will of the people is defined as their acquiescence, then it is not sufficient for legitimacy, for subjects “acquiesce” in the operation of *every* legal regime which is operational.
- (1) If the will of the people is defined as their consent in 1899-1900, then no such consent was expressed, and as the consent of a previous generation, it cannot be a moral reason for action today.
- (1) If the will of the people is defined as the consent of people today, no such consent has been expressed.
- (1) If the will of the people is defined as their desire - a volition more morally significant than “acquiescence”, but less clearly expressed than “consent”, then: there is no way to define popular desires which distinguishes between the Constitution and other lesser norms whose authority is in fact subject to the Constitution; and the value of autonomy, which might justify acting in accordance with popular desires, does not justify acting in accordance with the overarching and comprehensive norms imposed by a Constitution.
- (1) Democratic structures do not imply that the Constitution’s legitimacy is provided by the will of the people, for democracy may be justified in many ways other than by a theory of popular sovereignty.

Arguments (1), (2), (3), (4) and (5) are cumulative. They deal with various formulations of the theory of popular sovereignty. However, even if one of them succeeded, the theory would still fail because:

- (6) However defined, the will of the people would not be a necessary or sufficient moral reason for action because it is only tangentially relevant to the normal justification for legitimate authority.
- (7) The theory generates absurd consequences.

Arguments (6) and (7) are in the alternative.

[6.4] Recent claims about the authority of the will of the people go further than the proposition that the will of the people provides the Constitution with moral legitimacy. They also assert that the will of the people, whenever expressed in a particular way, is

a sufficient reason to impose legal obligations, irrespective of previous arrangements.

That is, the will of the people has *de facto* legal authority. However:

- (1) The mere existence of a moral obligation to obey the Constitution does not imply a moral right to coerce obedience.
- (1) Claims about the conclusive authority of the will of the people in the United States are incoherent, and in any case are not applicable to Australia.
- (1) The will of the people has not been regarded in Australia as having legal authority; and
- (1) There are good reasons not to regard the will of the people as having legal authority.

These arguments against the *legal* authority of the Constitution are *cumulative* to the arguments against the Constitution's *moral* authority. They raise an additional hurdle which must be cleared by those who claim that the will of the people supplies reasons to coerce obedience to the Constitution.

[6.5] Finally, it might be argued that canonical approval of the theory, either by the High Court, or by proposed Constitutional amendment might remedy these defects. However, canonical support for the will of the people cannot improve an incoherent moral argument.

6.3 Popular sovereignty is not sufficient for legitimacy

6.3.1 Popular acquiescence

Acquiescence is a form of will requiring the least effort from the people. It is undeniable that most Australians acquiesce in the operation of the Constitution. Both Clark in 1901, and Deane J more recently, attributed significance to this acquiescence:

If the present possessors of sovereignty discover that the result so produced is contrary in particular cases to their will in regard to future cases of a like character, they will amend the language which they previously retained as the expression of their will. If they do not amend it they must be presumed to accept the interpretation put upon it by the judiciary as the correct announcement of their present commands.⁶⁹

The fact of acquiescence is itself controversial. Some surveys suggest that many Australians are ignorant of the existence of the Constitution, let alone its contents.⁷⁰ How can

69. Clark (1901) at 21-22, sidenote, quoted with approval in *Theophanous* (1994) per Deane J at 181; similarly see Galligan (1995) at 29.

70. Constitutional Commission (1988) Vol 1 at 43. Saulwick (1994) at 14 reports a poll in 1992 in which only 64% of those polled knew that Australia has a written Constitution. According to Civics Expert

one “acquiesce” in rules having normative force when one is ignorant of those rules? But too much can be made of this. Galligan doubted the accuracy of these surveys, arguing that people are unlikely to respond positively to a bald and abstract question about the existence of the Constitution if they expect it to be followed by a more specific quiz, which will reveal their ignorance of some of the Constitution’s precise details.⁷¹ Virtually all Australians are aware that they have some system of government, and very few are in active revolt against it. The absence of active opposition can constitute acquiescence.

But granting that the people do acquiesce in the authority of the Constitution, it is difficult to equate this *acquiescence* with their *will*. Often we acquiesce in things which we do not particularly want, merely because the cost or futility of opposition provides sufficient reason not to resist. The state of affairs is then not “willed”.

More tellingly than this semantic argument, acquiescence is never a sufficient moral reason for action. A state of affairs is not morally desirable merely because people have reasons not to upset it. If acquiescence were a sufficient reason for obedience to a government, then *any* government, no matter how evil, would be legitimate. As Dawson J pointed out:

No doubt it may be said as an abstract proposition of political theory that the Constitution ultimately depends for its continuing validity upon the acceptance of the people, but the same may be said of any form of government which is not arbitrary.⁷²

Acquiescence is a *necessary* condition for legitimate authority. A legal system does not operate at all unless as a matter of fact people apply its rules to identify valid laws and then employ these laws as reasons for action.⁷³ This dovetails with Raz’s theory of authority: a regime only has *de facto* authority if as a matter of fact people treat its directives as pre-emptive reasons for action. And *de facto* authority is a necessary condition for a regime to possess legitimate authority. If people do not generally obey a regime’s directives, the regime will be unable to solve prisoner’s dilemma problems and to coordinate. This capacity is a key part of the normal justification for legitimate authority [3.1.2].

Group (1994) at 143, in a more sophisticated ANOP survey in 1994, only 18% of those polled had a rudimentary understanding that the Constitution sets up the Parliament and the Federal system; and only 41% of those polled knew that change to the Constitutional requires a referendum. Williams (1995b) at 288 notes these surveys and the problems they pose for the argument from acquiescence.

71. Galligan (1995) at 129.

72. *Australian Capital Television* (1992) at 181 per Dawson J.

73. Hart (1994) at 101-117.

However, this does not imply that acquiescence is *sufficient* to confer legitimacy. In particular, it does not follow that a new constitutional rule is legitimate merely because people acquiesce in its operation. Yet a superficial reading of positivist theory might suggest this.

Zines, for example, wrote that:

[the Constitution] is *now* law because it is accepted by the Australian people as their framework of government. In other words it is our fundamental law and needs no further legal justification.⁷⁴

But Zines' claim is *not* about why morally we *should* obey the Constitution. It is merely about how the Constitution can be identified as law.⁷⁵ A positivist theory such as that of Zines does not - and does not purport to - provide moral justifications for acting in accordance with the law as defined by popular acquiescence.

Thus, if the "will of the people" is equated with mere acquiescence, then it provides a necessary, but insufficient reason to obey the Constitution.

6.3.2 Consent at Federation

If one defines the will of the people as their consent, it is arguable that it has never been expressed. In some respects the problem in Australia is less acute than in many other countries. Often constitutions are drafted and imposed by persons with no electoral mandate to do so; or are drafted and imposed without direct reference to the electorate via a referendum. By contrast, most of the text of the Australian Constitution was considered by popularly elected conventions⁷⁶ and explicitly approved by referenda.⁷⁷

Nevertheless, these referenda fell far short of providing the approval of *all* Australian people of the time. Quite apart from those people who voted against the Constitution, substantial groups were excluded from constitutional referenda.⁷⁸ The following table demonstrates the problems:

74. Zines (1997b) at 93 (emphasis in original).

75. I pass over the problem that one cannot assume that popular acquiescence defines the whole of the law. Even in a generally posited system of law, moral argument may have an important role: see the discussion of "principles" in Dworkin (1977) at 14-45, and [4.2].

76. La Nauze (1972) at 90-91. Minor amendments to the Convention's draft were agreed by the colonial Premiers after the failure of a referendum in New South Wales. Their amendments were subsequently approved in a second set of popular referenda: La Nauze (1972) at 240-244.

77. The exception was s 74, providing for appeals to the Privy Council, discussed below [6.4.3].

78. Williams (1995b) at 286-287; Aroney (1997) at 28; Levy (1997) at 17 per Kirby J.

Colony	Referendum date ⁸¹	Population ⁷⁹	Voters enrolled ⁸⁰	Voted "yes" ⁸¹	Voted "no" ⁸¹	Yes as % of enrolment ⁸⁰	Yes as % of population
NSW	20.6.1899	1,323,460	300,000	107,420	82,741	35.81	8.12
Victoria	27.7.1899	1,176,248	288,600	152,653	9,805	52.89	12.98
Qld	2.9.1889	484,700	107,265	38,488	30,996	35.88	7.94
SA	29.4.1889	363,044	152,554	65,990	17,053	43.26	18.18
WA	31.7.1900	161,924	96,065	44,800	19,691	46.63	27.67
Tas	27.7.1899	171,719	39,002	13,437	791	34.45	7.82
Total		3,681,095	983,486	422,788	161,077	42.90	11.49

The electorate in many Colonies consisted of less than 25% of the population. This minority was not a randomly distributed sample. Women were able to vote only in South Australia and Western Australia.⁸²

There was some discrimination on the basis of socio-economic status. New South Wales, South Australia, Western Australia, Victoria and Queensland enfranchised all residents, whether or not property owners or ratepayers, subject to having resided in the relevant state or electoral district for a minimum period.⁸³ Tasmania only enfranchised ratepayers, those with earnings of at least £20 in the previous 6 months, and those who had previously had earnings of £40 per year but who were now unable to work due to sickness.⁸⁴ Victoria disqualified inmates of "eleemosynary or charitable institutions", and New South

79. According to 1897 statistics compiled by Coghlan, State Statistician of New South Wales, as reproduced in Crisp (1990) at 66. 1901 census figures differed by less than 10% in all States except Western Australia whose recorded population had increased to 184,124. These figures may have considerably underestimated the Aboriginal population: see Chesterman & Galligan (1997) at 63.

80. Enrolment figures are taken from "Particulars in Connection with the Referendum on the Commonwealth Bill taken on 31 July 1900. Furnished by the Returning Officer" *Minutes, Votes & Proceedings of the Parliament of Western Australia*, 2nd session, 1900, Vol 2, Paper No 33, p.5 Table III, reproduced in Clark (1955) at 517. Crisp (1990) at 149 does not indicate his source for similar but not identical figures of the "yes" vote as a percentage of enrolment.

81. Extracted from Quick & Garran (1901) at 223-225, 249-250.

82. *Electoral Code 1896 (SA)*, s 15; *Constitution Acts Amendment Act 1899 (WA)*, s 26. Cf *Parliamentary Electorates and Elections Act 1893 (NSW)*, s 23(1); *Constitution Act Amendment Act 1890 (Vic)*, s 128; *Constitution Act Amendment Act No 2 1896 (Tas)*, s 4; *Elections Act 1885 (Qld)*, s 6.

Western Australia made special arrangements so that women enfranchised by the 1899 Act could register for the referendum in 1900 although not yet on the electoral roll: Irving (1996) at 14; see *Australasian Federation Enabling Act 1900 (WA)*, s 7.

83. See the provisions in fn 82: Victoria and New South Wales imposed the most stringent requirement of 12 months' residence.

84. *Constitution Act Amendment Act No 2 1896 (Tas)*, s 4.

Wales, Western Australia, and Queensland had similar provisions.⁸⁵ Although the parliamentary elections for some Colonies were significantly biased towards property owners who could vote in each electorate in which they owned property, the constitutional referenda restricted each person to only one vote.⁸⁶

Few Aborigines voted for Federation. The bar on the franchise of those receiving aid from public charitable institutions effectively disqualified Aborigines on stations and reserves.⁸⁷ Franchise on the basis of established residence also prevented nomadic Aborigines from enrolling.⁸⁸ Western Australia also explicitly disqualified any person who was an “aboriginal native of Australia, Asia or Africa, or person of the half blood” unless they owned freehold property worth £50, and Queensland imposed a similar prohibition, waived only if the person owned freehold property worth £100.⁸⁹

There were other miscellaneous exclusions. New South Wales and Queensland excluded full-time employees of the police and military forces.⁹⁰ All States disqualified various categories of criminals.

Even amongst those who were entitled to vote, only a limited number did so. The lowest turnout was 36% in Tasmania, although the overwhelming majority there suggests that a larger turnout would have had little effect on the result. The highest turnout was 67% in Western Australia where there was the greatest controversy over joining the nascent federation.

The convention and referenda leading to the adoption of the Australian Constitution were unprecedented. They involved *more* popular participation than the processes which had

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85. *Constitution Act Amendment Act 1890 (Vic)*, s 142; *Parliamentary Electorates and Elections Act 1893 (NSW)*, s 23(4); *Constitution Acts Amendment Act 1899 (WA)*, s 28(1); *Elections Act 1885 (Qld)*, s 8(1)
86. Legislation in each Colony for referenda to approve the Constitution conferred a single vote on each person entitled to vote in the Lower House election for that Colony: *Australasian Federation Enabling Act 1899 (NSW)*, s 3; *Australasian Federation Enabling Act 1896 (Vic)*, s 35; *Australasian Federation Enabling Act 1899 (Vic)*, s 3; *Australasian Federation Enabling Act 1900 (WA)*, s 3(5); *Australasian Federation Enabling Act 1895 (SA)*, s 35; *Commonwealth Bill Amendment Act 1899 (SA)*, s 2; *Australasian Federation Enabling Act 1895 (Tas)*, ss 33, 35; *Australasian Federation Enabling Act 1899 (Qld)*, s 3.
87. Bartlett, Brown & Nettheim (1992) at [24]. Chesterman & Galligan (1997) at 14 consider it unclear whether this rule was in fact applied to Aborigines, although it is clear that very few were in fact enrolled.
88. Quick & Garran (1901) at 223 note that there was “a considerable nomad population not registered” in Queensland.
89. *Constitution Acts Amendment Act 1899 (WA)*, s 26; *Elections Act 1885 (Qld)*, s 6.
90. *Parliamentary Electorates and Elections Act 1893 (NSW)*, s 23(3); *Elections Act 1885 (Qld)*, s 8(3-4).

led to the Canadian and American Constitutions - and perhaps any other constitution of their time. Nevertheless, they fell short of unanimous popular approval. As a result of imperfect franchise, imperfect participation, and substantial dissent, those approving the constitutional referenda constituted less than 12% of the Australian population. If there is some moral magic in the consent of a majority of the population, it was not worked in Australia prior to Federation.

However, even if one supposes that the people did consent to the Constitution prior to Federation, this consent is irrelevant to obeying the Constitution today. If there is any reason for treating consent as morally significant, it must be related to the *choice* of those who consent. But no-one alive in Australia today participated in the choices leading to the Constitution. Why treat them as bound by the choices of their great-grandparents and great-great-grandparents?⁹¹

As a moral reason for action, consent normally only concerns the person who consented. Consent is morally significant only because - and therefore when - one is the best judge of one's own interest, or it would endow an appropriate sense of self-responsibility, or because it allows one to shape one's own identity.⁹² Of course, consent may affect those dealing directly with those who consent: for example, my consent to a medical procedure alters my doctor's reasons for action. Occasionally the impact of consent may go further: I can consent to a medical procedure for my infant daughter. But here my consent has significance only because it is presumed that I will be a better judge of her interests than either my daughter or her doctor. If it is clear that my judgment is irrational or capricious it will - and should - be overridden.⁹³

These reasons do not apply to the consent of the founding generation: they are unlikely to be the best judges of the interests of today's generation; and obviously the time has passed when giving moral significance to their consent endowed them with a sense of responsibility or enabled them to shape their own identity. Today's generation need not obey the Constitution because of the interests of the founding generation.

91. The problem of intergenerational consent can be traced back at least as far as Hume (1777) at 359-360, and is discussed in Holmes (1988) at 199-208.

92. Raz (1986) at 86-87.

93. *Marion's Case* (1992) at 280-281 per Brennan J (dissenting, but not on this point), at 317 per McHugh J.

Thus the consent of the founding generation is illusory, and even if it existed, it would not provide reasons for action today. The problem of intergenerational consent has led some to suggest that constitutions should be annulled and reviewed once every twenty years.⁹⁴ But this assumes that consent is the only reason for obedience. There are other reasons why people today should act in accordance with legal instruments created by their predecessors.⁹⁵

6.3.3 Contemporary consent

Would the consent of the *present* generation be a reason for action today? The actions of today's people may remedy any imperfections in popular approval of the Constitution in 1899-1900, and the inadequacies of that consent as a reason for action today. It is possible that people today are the best judges of their own interests; and giving moral significance to their consent might endow them with a sense of responsibility or enable them to shape their own identity.

However, no act of "consent" can be identified which serves these ends. Contemporary consent is factually elusive. Contemporary Australians have not explicitly approved of the Constitution as a whole.

One might claim that the approval of amendments in referenda constitutes implicit approval for the whole. This barely amounts to "contemporary" ratification: the last successful amendments to the Constitution occurred in 1977. Those who voted in these referenda would barely compose half of Australia's population in 1998.⁹⁶ In any case, approval of an amendment does not amount to consent. Approval of an amendment to the Constitution does not amount to approval for the *whole*. Approval of an amendment is equally consistent with the belief that the Constitution is a bad job which should if possible be abolished and meantime would be made marginally less objectionable by amendment. Furthermore, if significance is attached to *approval* of an amendment, how could people *object* to the Constitution? *Rejection* of a Constitutional amendment cannot be construed as

94. Ely (1980) at 11, citing Webster and Jefferson. The historical background to these claims, and Madison's rejoinder, are discussed in Holmes (1988) at 202-221. For a similar proposal in contemporary Australia see Williams (1995b) at 289.

95. See Chapter 10; see also Holmes (1988) at 215-240.

96. The minimum voting age in 1977 was 18: *Commonwealth Electoral Act 1918 (Cth)*, s 39(1). Thus anyone aged under 37 in 1996 was ineligible to vote in the 1977 referenda. The median age of Australians, as recorded by the last census in 1996, was 34: McLennan (1996) at 36. Thus almost half those alive in 1996 were ineligible to vote in 1977. This calculation does not include approximately 1.5 million resident immigrants aged over 5 who entered Australia between 1981 and 1996: McLennan (1996) at 42; but it is perhaps more arguable that their immigration in itself amounts to an implicit consent to the Constitution.

rejection of the Constitution. Rejection of an amendment may well be based on a belief that the Constitution in its current form is desirable. *Failure to abstain* from a Constitutional referendum cannot have moral significance when voters are coerced into participation.⁹⁷ Thus Constitutional referenda - whether accepted or rejected - do not imply consent to the Constitution.

Does participation in the democratic processes created by the Constitution amount to consent to the Constitution? This participation cannot amount to actual consent. Consent is considered morally important only if there is a specific act unequivocally directed to altering normative obligations.⁹⁸ For example, a consent to a medical procedure is an act intended to alter a doctor's moral reasons for action. What would have been an unjustified assault before consent becomes a justified operation. But part of the moral magic is that the consenter intended that specific change in moral obligations. Voting is not consent of this sort. One does not normally intend one's act of voting to result in incurring an obligation to obey the Constitution. One normally votes merely with the intention of electing one candidate rather than another. It is rational for voting to be motivated primarily by a desire *not* to be ruled by the rejected candidates, and without any desire to be ruled by the accepted candidate. The act of voting is not directly referable to an intention to incur an obligation to obey law.⁹⁹

The claim that an act only counts as "consent" if the consenter contemplates the specific change in the normative situation is not mere stipulation. One regards consent as morally significant because in such circumstances it is desirable to recognise consent, either because one is the best judge of one's own interest, or because it endows an appropriate sense of responsibility, or because it allows one to shape one's own identity.¹⁰⁰ If one's will is not directed toward the specific change in normative circumstances, then none of these justifications could apply.

Even if the people could consent by voting, their consent would be vitiated if the act of consent were coerced. Duress vitiates consent because a credible threat undermines the normal reasons for recognising consent.¹⁰¹ Voting in Australian elections is legally

97. *Referendum (Machinery Provisions) Act 1984 (Cth)*, s 45.

98. Smith (1973) at 961; see also Raz (1986) at 81-84.

99. Smith (1973) at 962 reaches a similar conclusion.

100. Raz (1986) at 86-87; and see above text accompanying fn 92-93.

101. Raz (1986) at 88-89.

coerced.¹⁰² Although the penalties are not severe, they at least detract from any argument that voting results in an obligation of general obedience to political institutions.

Some officials make explicit promises which do amount to consent to the Constitution. High Court Justices, for example, swear on taking office to “do right to all manner of people, according to law”.¹⁰³ Their act (of swearing) specifically refers to the putative obligation (of obeying the law, and specifically the Constitution). However, only a small proportion of Australians consent to law and the Constitution in this way: it falls well short of the consent of “the People”. In any case, judicial oaths of office do not create additional obligations [9.1.3].

Alternatively, one might regard the consent of those voting in the Federation referenda as the best approximation to the consent of people today.¹⁰⁴ However, 100 year old referenda are unlikely to be the best available approximation of contemporary consent [7.2]. In any case the argument assumes that an approximation to consent is equivalent to real consent. But unlike *real* contemporary consent, there are no moral reasons to have regard to a 100 year old approximation, and thus there is no reason to impute it to the people of today. A 100 year old approximation is not the best judge of contemporary interests, nor does it endow an appropriate sense of responsibility, nor does it permit people today to shape their own identity.

Finally, there is the possibility that the will of the people is their *implied* desire. However, consent is normally implied only when a person has acted so as to make a reasonable observer think that the person has in fact consented. For the reasons just given, it is not reasonable to infer that a person has consented to the Constitution from the fact that he or she acquiesced in the Constitution’s operation, or voted in a referendum or election. Alternatively, consent may be implied if there is some other ground for a person to recognise a change in moral circumstances. It is arguable that gratitude or fair play might justify discovering an implied consent.¹⁰⁵ However, if such grounds exist, then those grounds, rather than the imputed consent, are the reasons to obey the Constitution. As Bentham wrote, once the reasons justifying an implied consent are identified, there is no need to invoke consent at all. Instead, one can:

102. *Commonwealth Electoral Act 1918 (Cth)*, s 245.

103. *High Court of Australia Act 1979 (Cth)*, Schedule.

104. Craven (1990) at 178, 180; see also Craven (1992a) at 29; Craven (1992c) at 894-895.

105. Smith (1973) outlines why these potential bases for political obligation should be rejected.

bid adieu to the original contract and [leave] it to those to amuse themselves with this rattle, who could think they needed it.¹⁰⁶

For the moment, we can conclude that there is no act of today's people of Australia which amounts to morally significant consent to the Constitution.

6.3.4 Popular desire

Alternatively, the will of the people might be defined as their "desire". The argument is that the Constitution is "desired" or "wanted" by the Australian people, and this desire should be respected because it promotes, at least to some extent, self-governance.

This definition of the "will of the people" provides a more plausible argument. Part of the justification for the Australian Constitution might be that it provides a system which most of the time is consistent with, rather than opposed to, the desires of most Australians. More controversially, the constitutional structure itself may be consistent with, rather than opposed to, the desires of most Australians. And perhaps most Australians desire that their views concerning constitutional structure rather than their views concerning particular outcomes should prevail.

However, there is no way to define the "desires" of the people so as to generate these results. Popular desires are more amorphous than either popular acquiescence, or popular consent. It is difficult to establish what is really desired. In particular, there is little real evidence that there is any popular desires for desires about the Constitution to take priority over other desires. What evidence is there that the people desire to obey the Constitution, but do not desire to subject its norms to any proposal specifically considered in an election campaign? What evidence is there of a popular desire that an amendment to the Constitution, approved by a majority should not prevail unless it is also approved by a majority of voters in a majority of States? The popular desire might well be for obedience simply to any legislation enacted by a popularly elected government, or obedience to the whims of the latest opinion poll. Or as McHugh J suggested, the popular desire may be for governance according to the rules laid down by the Imperial parliament and rules which derive their authority from this source.¹⁰⁷ The theory of popular desires is so amorphous that it cannot guide choice between these alternatives.

106. Bentham (1823) at 441.

107. *McGinty* (1996) at 230.

The theory adopted by McHugh J identifies the content of the popular will by reference to the Constitution as approved by the Imperial Parliament plus any amendments approved in accordance with it. But this definition is viciously circular: one cannot use the will of the people to *justify* obedience to the Constitution if one identifies the content of the will of the people by reference to the Constitution.

Alternatively, one might define the desire of the people by simple majoritarianism.¹⁰⁸ Simple majoritarianism has a presumed force because it is the only rule that treats voters equally, and policy proposals (including the *status quo*) equally.¹⁰⁹ In the absence of any authority there is no *a priori* reason to treat any policy as preferable to any other. Perhaps one might add a requirement that majoritarianism is legitimate only if preceded by deliberation and a pause for reflection between drafting and ratification.¹¹⁰

However, the circumstances in which simple majoritarianism might have a presumed moral weight almost never arise in practice. Majoritarianism is dependent on the existence of authority. Only authority can delimit the physical boundary of the relevant polity and who is part of it. Until these questions are resolved, one cannot know whether there is a majority. Controversy over these questions is unresolvable in the absence of authority - that is, an established source *not* identified merely by popular will. As the modern history of Serbia and Northern Ireland demonstrates, these questions may actually be the *source* of the conflict. If a system of authority *does* exist, there are usually *prima facie* reasons to treat policies imposed in accordance with that system as preferable [10.2.4]. But that undermines the assumption of simple majoritarianism that all possible policies (including the *status quo*) should be treated equally.

Simple majoritarianism is also inconsistent with the requirement that a Constitutional amendment be approved by a super-majority.¹¹¹ If the desire of the people provides a sufficient reason for action, then the express vote of a majority for an amendment would override the desire of a previous majority to prevent amendment except by a super-majority. One might avoid this result if the desire of today's majority is for constitutional amendment to

108. Amar (1994) at 482 suggests that the legitimacy of the United States Constitution depends on the two-step majoritarian procedure of popular election of delegates to a convention to draft the Constitution, and then ratification by popularly elected State conventions elected specifically for the purpose.

109. Amar (1994) at 503.

110. Amar (1994) at 502-503.

111. Ely (1980) at 11-12.

occur only if the procedures laid down in the past are followed. Again there is little evidence of such a desire.

Finally, one might define the desire of the people by their practice. One *can* show, as a matter of fact, that people *acquiesce* in the operation of the Constitution and the political institutions it creates. The observation of many social interactions would lead to identification of the Constitution (as historically amended) as the crucial determinant of validity. The popular desire might therefore be equated with the social custom of according authority to the Constitution. This analysis resembles the claims of Hart and Zines that a Constitution has legal authority provided it is habitually obeyed [4.1.2]. Again, however, this indicium is not specific enough. People also acquiesce in a variety of practices which are *not* constitutional. But this acquiescence is not usually considered any reason for a Court to permit those practices to continue.¹¹² Thus apparently not all forms of acquiescence manifest the desire of the people. Again the theory is incapable of explaining why obedience *to the Constitution* is the outcome - and the only outcome - of the desire of the people.

But assuming that there is an explicit and specific desire to abide by the Constitution, does it have moral significance? Arguments from consent are overwhelmingly popular, both recently in Australia, and more traditionally in the United States. This may be because the theory appeals to an assumption that government which reflects its subjects' desires somehow preserves their autonomy.¹¹³

There may be an *inherent* value in autonomy, and therefore in respecting the exercise of a choice to have a particular system of government, as defined by a constitution.¹¹⁴ Such a choice involves persons in making decisions which affect themselves. This promotes the good of practical reasonableness - the value of a person making and acting on moral judgments [4.5.2]. However, there is only reason to respect a choice about the system of government, if the system chosen does not surrender unconditionally the capacity to make further choices about the system of government.¹¹⁵ The Australian Constitution preserves the capacity to make further choices about the system of government, but only if members of the Commonwealth Parliament give people that opportunity in a referendum. Thus the

112. An exception may be where that practice is itself motivated by previous judicial decisions about the Constitution: *Capital Duplicators [No 2]* at 590-591, 593 per Mason CJ, Brennan, Deane and McHugh JJ.

113. Raz (1995) at 360-361.

114. Raz (1995) at 363.

115. Raz (1995) at 364.

opportunities provided by the Australian Constitution for the people to make further choices about their system of government are extremely limited. The argument from autonomy is weak at best.

In conclusion, the claim that the Constitution is legitimate because of popular desires is at best weak. There is no obvious means to define the will of the people which does not imply a desire to subordinate the Constitution to other legal norms. Even if the desire of the people could be defined so as to indicate a desire to be bound principally by the Constitution, the moral arguments for respecting that desire are weak. The value of autonomy is not strongly promoted, and in any case, respecting that desire all but precludes further exercise of that form of autonomy.

6.3.5 Implication of democracy

Others have considered respect for popular will to be a necessary implication of democracy and popular input to the process of Constitutional amendment. For example, Galligan claimed that there would have been no point to the democratic processes of referenda leading to adoption and alteration of the Constitution unless the consent of the people was necessary to legitimacy.¹¹⁶ Nor would there have been any point to claims in 1900 that the text of the Constitution approved in referenda had an inherent legitimacy which made any proposed amendment by the Imperial Parliament improper.¹¹⁷

However, there may be a point to democracy other than popular consent. Democratic procedures can be justified instrumentally [4.5.1]. A locally elected Australian constitutional convention was more likely than the British Colonial Office to understand the problems which needed to be addressed in an Australian Constitution. Popular referenda were more likely than the Imperial Parliament to decide correctly whether the Constitutional Conventions had addressed these problems adequately. Furthermore, a process of referenda was more likely to result in the Constitution being obeyed, which was (and is) crucial to its ability to coordinate, and hence its legitimacy. A popular vote can readily contribute to legitimacy even if that legitimacy depends on more complex arguments than the mere fact of participation.¹¹⁸

116. Galligan (1995) at 29; similarly see Irving (1997) at 115.

117. Irving (1997) at 116.

118. Dahl (1989) at 84 labels such instrumental arguments as “loose and unphilosophical”. They may, nevertheless, provide more than adequate *practical* reasons for respecting democratic decisions.

Furthermore, the historic *failure* of the claim that the Imperial Parliament lacked legitimacy to amend the draft Constitution [6.4.3] demonstrates that legitimacy does *not* depend on popular approval.

Thus although there are limited connections between democracy and popular sovereignty, popular involvement in constitution-making and in the ordinary processes of elections does not necessarily imply that the source of the Constitution's legitimacy must be derived from the will of the people.

6.3.6 Consent and the normal justification

Even if the people did consent, explicitly and specifically, to the Constitution, this would provide neither a necessary nor a sufficient reason to obey the Constitution. Arguments from consent, desire, or acquiescence are not directly related to the normal justification for legitimate authority [3.1.2]. Normally my obedience to a regime is justified if I would comply more closely with direct reasons by complying with the regime's directives rather than by attempting to reason for myself.¹¹⁹ A regime's directives may be superior to personal decision-making because the regime has greater expertise, facilitates coordination, solves prisoner's dilemma problems, or reduces decision-making costs. The directives of a regime to which the people have consented may or may not meet these criteria. The people's regime may issue wise directives which coordinate effectively. Or its directives may be unjust and divisive. The latter should not be obeyed, notwithstanding the consent of the people.¹²⁰ One can only avoid this analysis if one assumes that making choices is inherently more important than other values.¹²¹ The claim that autonomy overrides all other human values is inherently implausible.

Even advocates of the popular sovereignty theory implicitly admit the importance of considerations other than consent. For example, Finn claimed that the Australian government "professes to derive its legitimacy and authority from the people". Yet he conceded that government arrangements should also accommodate "other values which we deem to be

119. This is a simplification. First, a regime may be authoritative even if its directives are treated as important rather than conclusive reasons for action [3.2.3]. Secondly, a regime's directives may be morally significant reasons for action even if *some* of them do not meet this standard: the legitimacy of a regime depends upon a substantial proportion of its directives doing so [4.4].

120. I am assuming here that an action does not cease to be unjust merely because its victim consented.

121. This assumption underlies Rawls' distinction between the Right and the Good. The distinction is attacked in many places, including Mulhall & Swift (1997) at 37-164, Finnis (1980) at 105-106.

important in our governing”, including stability and the “public interest”.¹²² As Stokes pointed out, unless further conditions for legitimacy are added, the theory of popular sovereignty implies that unlimited majoritarianism is morally desirable.¹²³ Yet from where do these values other than consent draw their moral force? The answer must be that they are independent reasons for obedience, some of which are necessary to the legitimacy of government.

But if one concedes that conditions other than consent are necessary for legitimacy, can these other conditions be *sufficient*, so that consent becomes redundant? The theory of authority suggests that there is no reason to presume that consent is necessary for legitimacy. A regime whose directives satisfy the normal justification may or may not enjoy the consent of the people. A rigid hereditary autocracy might issue wise directives which coordinate effectively. It may be less likely to do so than a constitutional democracy, but that is a pragmatic argument about the functioning of different types of government, not a claim about the inherent moral value of the consent of the people [4.5].

Thus an analysis of authority demonstrates that the consent of the people is neither a necessary nor a sufficient condition for obedience.

6.3.7 Consent and absurdity

The will of the people does not seem to provide plausible reasons for obedience to the Australian Constitution. This conclusion is not surprising. If consent were vital, the consequences would be bizarre. Those who do not consent would have a legitimate claim to resistance. Presumably others would be morally bound to recognise this claim. There would be no justification for coercing those who explicitly withdraw or refuse to give their consent.

If consent really were necessary, then the absence of real consent in Australia would be problematic. Indeed, Williams accepted this conclusion, and argued that the absence of real consent provides an imperative for perpetual constitutional renewal.¹²⁴ But the logical consequence is that each generation would need to approve the Constitution before it could acquire moral force. Political theory would require a referendum - to the entire Constitution - each time there was a substantial shift in electorate - perhaps once every five years. Even then the vote would inevitably be for constitutional alternatives drafted by an elite.

122. Finn (1995) at 21. One might add a proper weighting of the interests of electoral minorities.

123. Stokes (1990) at 252.

124. Williams (1995b) at 289.

Thus there are fundamental problems with the claim that the will of the people imposes moral obligations to obey the Constitution: the popular will is fictional; the terms of the popular will cannot be identified; there is no reason to consider the people's will as important morally; it would be neither necessary nor sufficient to ensure legitimacy; and the entire theory leads to strange results.

6.4 Popular will lacks legal authority

6.4.1 Moral obligation does not imply legitimacy of coercion

The theory of popular sovereignty claims not just that we have moral obligations to obey the Constitution. It also claims that the will of the people is a sufficient reason to coerce individuals to obey the Constitution. Deane J claimed not only that there are good reasons to conform to the will of the people, but that the courts should apply the Constitution because of the popular will.¹²⁵ Presumably this would ultimately involve the coercive measures usually entailed in applying law.

The connection between moral and legal obligation is not one of simple entailment.¹²⁶ Whether or not the will of the people is a sufficient moral reason for action does not determine whether or not we should treat it as a sufficient basis for coercion. There are many good, if often outweighed, reasons not to coerce a morally good action.¹²⁷ In essence the question is whether the will of the people should have "legal authority" - should *courts* treat the will of the people as a conclusive reason for legal decision, irrespective of other considerations? Those who support the theory of popular sovereignty have never provided arguments to address this issue.

One might try to circumvent the argument about whether the will of the people justifies coercion by describing the will of the people as a "legal reason" - that is a reason that has in the past been incorporated into the law. Amar suggested that on the best reading of early American history, the will of the people had legal authority. This argument begins as description rather than justification. It claims that the will of the people has been treated as a legal reason. The argument does not immediately demonstrate the justifications for doing so.

125. *Theophanous* (1994) at 171.

126. Finnis (1996) at 203-205.

127. See George (1993) at 41-42.

6.4.2 Authority of the US people

There is some evidence that in the United States, the will of a majority of voters was treated as a sufficient to provide legal norms, including the Constitution, with legal validity. It was widely accepted before Federation in the United States that a vote of a majority of the People¹²⁸ naturally conferred legitimacy upon a legal system,¹²⁹ an understanding of majoritarianism adopted from Locke. The assumption that majority will conferred legitimacy on a legal system was used to justify adopting the new United States Constitution even though the procedures for its adoption did not conform to the textual requirements of the various State Constitutions which it superseded.¹³⁰ This view of “majority rule popular sovereignty” was expressly recognised in the Declarations of Rights in many State Constitutions around 1776.¹³¹ It was also manifested in the nineteenth century when a number of State Constitutions were amended by simple majorities, in contravention of their express procedures for amendment.¹³² Amar claimed that the Preamble, and the 9th and 10th Amendments, of the US Constitution incorporate this understanding by recognising the *legal* right of a majority of the People to amend the US Constitution, irrespective of its explicit terms for amendment.¹³³ Amar concluded that a constitutional amendment approved by a majority of the People of the United States would be lawful because:

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128. The US literature usually capitalises the abstraction of “the People” (sometimes a simple majority, sometimes a majority acting through some procedure specified by the theory).
129. Amar (1994) at 464.
130. Amar (1994) at 469-475. For example, the Constitution of Maryland required that amendments be passed by the Maryland legislature, both before and after a general election (Amar (1994) at 469-470). The ratification of the United States Constitution did not conform with this requirement of the Maryland Constitution because it was ratified by a convention directly elected by the Maryland electorate.
131. Amar (1994) at 477-487. For example the Constitution of Virginia provided that:
- When any government shall be found inadequate or contrary to these purposes a majority of the community hath an indubitable, inalienable and indefeasible right to reform, alter, or abolish it in such manner as shall be judged most conducive to the public weal.
132. Amar (1994) at 497-499. For example, the Constitution of Pennsylvania provided that every seven years a “council of censors” was to meet, and if 2/3 of the censors agreed, a constitutional convention would be convened to discuss and approve amendments to the Constitution of Pennsylvania (Amar (1994) at 472). Nevertheless, in 1790 the Constitution of Pennsylvania was amended by a Constitutional Convention *not* authorised by this clause, but approved by a simple majority of the electors of Pennsylvania (Amar (1994) at 497-498).
133. Amar (1994) at 492, 499-500. Berns (1996) at 188-190 shares Amar’s views about the intellectual sources of the 9th Amendment, and his conclusion that it was an attempt to confer legal authority on the People to issue new legal rules for themselves, irrespective of the remainder of the Constitution. Berns suggested that one can view the American Civil War as a contest over the legal and moral validity of this claim. Alternatively, one can view the War as a contest over the relevant polity. Whereas Berns concluded that the Amendment attempted to preserve the rights of the majority of the People *of a State*, Amar thought that the Amendment only preserved the rights of the majority of the new polity *of the entire United States*.

- the amendment would be within the terms of Article V which does not expressly exclude amendments in this form;
- the amendment would have as great a claim to legitimacy as the original Constitution; and
- the argument accepted in the late eighteenth century remains valid: a majority “naturally” has authority to bring about constitutional change.

Even if true in the United States, the first two of these arguments do not apply in Australia. The third argument is applicable in Australia, but logically indefensible in either country.

Article V of the United State Constitution sets out a procedure for amending the Constitution. The wording of Art V at least provides a foothold for the argument that it does not *exhaustively* specify the procedure for amendment . Art V provides that:

Amendments ... shall be valid to all Intents and Purposes, as Part of this Constitution, when ... The Article does not provide that amendments shall *only* be valid when passed in accordance with the procedure laid down. Amar argued that the Article left open other amendment procedures.¹³⁴ By contrast, s.128 of the Australian Constitution explicitly excludes such an argument by its terms that:

This Constitution shall not be altered except in the following manner:- ...

The Constitutions of the United States and Australia also differ in their express and historical claims to legitimacy. The United States Constitution proclaims that its own legitimacy is derived from “We the People”, and was imposed contrary to the then-existing procedures for amendment.¹³⁵ By contrast, the Australian Constitution’s claim to legal validity and legitimacy did not rest simply upon the vote of the people. Rather, those involved ensured that it was approved by the Imperial Parliament, and so complied with the then-valid procedures for conferring legal authority.

In common with Amar, Ackerman claimed that in the United States, “the People” retain legal authority, irrespective of the terms of the Constitution. In moments of “higher lawmaking”, Ackerman said, the People can create new legal norms without complying with

134. Cf Dow (1990); Tribe (1995) at 1239-1245; Monaghan (1996) arguing powerfully that Article V should be read as providing an exclusive procedure for legal amendment.

135. Cf Tribe (1995) at 1286-1292 arguing that the extraordinary circumstances of the late eighteenth century are no guide to *constitutional* legitimacy in modern times. One might add that, in contrast to the circumstances of the adoption of the United States Constitution, today’s people are subject to a stable and relatively just system of government under the Constitution which has persisted over a period of time, and this history provides a reason *not* to accept a majoritarian decision in conflict with the Constitution.

the existing Constitution. However, Ackerman considered that legitimacy depended on more than a mere majority. He proposed that a legal amendment of the Constitution occurs if:

- the President claims a mandate from the people for a programme;
- Congress passes supporting legislation;
- the Supreme Court invalidates the legislation;
- President and Congress repass the legislation and gain broad support at the next election; and
- the Court makes a “switch in time” to approve the legislation.¹³⁶

Ackerman has suggested that this form of amendment is legally authorised by the text, although this has been fiercely disputed by Tribe.¹³⁷ Certainly the process Ackerman outlines bears no resemblance to the procedures for Constitutional amendment laid down by Article V of the US Constitution. Instead Ackerman’s claim is based on the events which led to the Reconstruction amendments, and judicial approval of the New Deal legislation.

Ackerman’s regime for amendment is specific to the history, and therefore the legal culture, of the United States. But even in that context his logic is doubtful. The fact that the New Deal legislation has been accepted for a significant period of time is a reason not to upset it now [10.2.6]. However, this reason did not apply when the legislation was introduced. It is possible for a set of arrangements to acquire legitimacy over time which they did not originally possess. Thus the present legitimacy of the New Deal legislation does not demonstrate the legitimacy of the events which led to its passage. Contemporary practices which accord with the procedure followed in 1930 do not thereby *immediately* acquire legality. Similar criticisms apply to Amar’s theory.

6.4.3 Authority of the Australian people

Claims about legal rights reserved to the People remain controversial in the United States.¹³⁸ They are unmooted in Australia. The practice that legal validity depends on conformity with previously established mechanisms for amendment, rather than on popular will unmediated by such mechanisms, is deeply entrenched in Australia’s history. Established amendment procedures were scrupulously adhered to in enacting the Constitution in 1900, and in the alterations effected by the *Australia Acts*.

136. Ackerman (1991) at 268; see also Ackerman & Golove (1995).

137. Tribe (1995) at 1239-1248.

138. See generally Levinson (1995).

Indeed the history of the Australian Constitution *contradicts* claims that the will of the people confers legal validity on any norm approved by a majority. The draft Constitution was approved by a referendum in each colony [6.3.2]. In accordance with the legislation which authorised these referenda, the Parliament of each colony adopted an address to the Queen, requesting that the Imperial Parliament pass legislation accordingly. However, when the draft Bill was transmitted to London, Chamberlain, then Secretary of State for the Colonies, proposed a number of amendments. After fierce resistance from the delegates of the Colonial Premiers, these demands were reduced to a single amendment, which would preserve a right of appeal from Australian courts to the Privy Council.¹³⁹ Ultimately Chamberlain insisted on amending cl 74 of the draft Bill, and the governments of the colonies telegraphed their acceptance of the new clause, although the South Australian government reiterated its inability to accept any amendment, whilst accepting that it did not anticipate any difficulty with the amended clause.¹⁴⁰ The amended draft was then enacted into law by the Imperial Parliament.

Thus at least one clause of the Australian Constitution contradicted the text approved by the people.¹⁴¹ The significance of this was understood at the time. Deakin was one of the delegates of the colonial Premiers sent to London to negotiate the passage of the draft bill for an Australian Constitution through the Imperial Parliament. Deakin alleged that Chamberlain felt and resented the implication of the colonial request for unaltered enactment of the draft Constitution. Chamberlain thought that to accede would have recognised Australian legislative independence “as amply as was that of the United States after their separation.” Deakin claimed that Chamberlain told an associate that:

Apart from the merits of the amendments he was resolved to demonstrate the supremacy of the Imperial Parliament and his own too by insisting upon some alternation however small.¹⁴²

As four of the five delegates themselves insisted, any alteration of the draft Bill would “vitate the agreement to unite”.¹⁴³

The people’s lack of legal authority is also reflected by the aftermath of the secession referendum in Western Australia in 1933. The referendum in favour of secession was passed

139. See La Nauze (1972) at 248-269 describing the British Government’s amendment of the version of the clause approved by referenda.

140. Quick & Garran (1901) at 247

141. Ironically, the clause was formally made defunct not by a Constitutional amendment approved by the Australian people, but by the *Australia Acts 1986*, s 11(1).

142. Deakin (1944) at 144.

143. Barton et al (1900b) at 65.

by a majority of almost 2:1. But the Western Australian government did not begin to operate as an independent country on the strength of that referendum. Instead, it petitioned the Imperial Parliament for amendment of the *Commonwealth of Australian Constitution Act 1900 (UK)*.¹⁴⁴ Amendment under existing procedures was considered crucial to legal validity, unlike the will of the Western Australian people. Historically, the will of the Australian people has not been treated as conferring legal validity.

It still is not. Imagine, for example, a declaration by the Western Australian Parliament *beyond* its authority under the Commonwealth Constitution,¹⁴⁵ but backed by a Western Australian referendum, that the Commonwealth Constitution no longer applies to Western Australia, and that instead Western Australia will be bound by a new constitution. At least in the short term, there is every possibility that Australian courts - particularly the High Court - would simply ignore the declaration on the basis that it had not been posited in accordance with existing authoritative norms for identifying legal validity. Similarly, the wishes of at least a majority of the people of the Australian Capital Territory, as expressed in a referendum, do not cast doubt on the legal validity of the system of self-government imposed on the Territory contrary to that referendum.¹⁴⁶ Nor has it ever been suggested that the will of the majority of the people, as expressed in a referendum, would override the additional requirement of s.128 that an amendment be legally valid only if approved by a majority in a majority of States.

Thus the claim that the will of the people creates legal obligations is contradicted by the legal practice of Australia. The will of the people is not accepted as a sufficient basis for judicial decisions.

6.4.4 Normative reasons to deny the authority of the people

Should Australia nevertheless adopt a practice of legally implementing popular will? Ultimately the question cannot be decided by reference to existing practice or the Constitution's express terms: like any other rule, the Constitution cannot determine whether

144. Craven (1986a) at 34-36.

145. Craven (1986a) at 160-175 doubts whether a declaration of secession approved in accordance with s 128 of the Constitution would ever be legally effective; but contra Crawford (1992) at 187.

146. A referendum proposing self-government for the ACT was rejected in 1978. An opinion poll reported in *The Canberra Times* (20 November 1988) suggested that a new referendum might also fail; nevertheless there was no suggestion in debate over legislation imposing a system of self-government that the legislation was invalid: see Commonwealth, Senate, *Parliamentary Debates* Vol 130 (23 November 1998) at 2603 per McMullan; (23 November 1988) at 2597 per Jenkins; (24 November 1988) at 2722-2723 per Reid.

it should be applied.¹⁴⁷ Ultimately then, the legal argument depends on the moral arguments for respecting the will of the people which have already been discussed and rejected. It would also require further work to show why any moral obligation should also be legally coerced.

6.4.5 Paradoxes of popular sovereignty

There are insurmountable logical, ethical and legal problems in deriving the Constitution's legal authority from the will of the people. The attempt to apply the theory to the Australian Constitution despite these problems inevitably produces a number of paradoxes, noted by Zines:¹⁴⁸

- The Commonwealth Parliament, created by the sovereign people, itself determines who is entitled to citizenship, and therefore who is part of the people: the sovereign's delegate appears to invent the source of its powers.
- The people do not direct their delegate - the parliament - and cannot even act in a referendum unless it is initiated by the parliament.
- Apparently because the authority for the Constitution is derived from the will of the people, there is an obligation to act in the interests of the people; by contrast the historic derivation of the Constitution's authority from the Imperial Parliament apparently created no obligation to act in accordance with Imperial interests.

The further thesis that popular sovereignty only began with the passage of the *Australia Acts* creates even more incongruities:

- The authority of the people appears to have been conferred by Acts of the Imperial, Commonwealth, and State Parliaments.¹⁴⁹
- If the crucial characteristic of popular will is the effective power to bring about legal change, then sovereignty must have been transferred much earlier than the passage of the *Australia Acts*.¹⁵⁰
- To the extent that British parliamentary sovereignty impaired popular sovereignty before 1986, s.15 of the *Australia Acts* appears to have transferred that power not to the people, but to the Commonwealth Parliament.¹⁵¹

147. Schauer (1995); Finnis (1980) at 275-276.

148. Zines (1997b) at 95-99.

149. Aroney (1995) at 268.

150. Winterton (1998a) at 8.

151. Winterton (1998a) at 8. One possible counter-argument is that the *Australia Acts* were crucial because they transferred *plenary* power, and this has particular consequences according to Diceyan theories of sovereignty: cf [5.4].

These paradoxes are not merely metaphysical quibbles which can be smoothed away by the practicalities of law. They are symptoms of the fundamental irrationality of the entire doctrine.

6.5 Canonical claims for popular sovereignty

Despite all of these problems, express judicial statements have approved the theory that the popular will is a sufficient reason for judges to obey the Constitution. The Republican Constitutional Convention advocated that the preamble of the Constitution be altered to include a statement that:

[We the people of Australia] asserting our sovereignty, commit ourselves to this Constitution.¹⁵²

More recently, the Prime Minister of Australia proposed a new preamble including a statement that the Commonwealth of Australia is “constituted by the equal sovereignty of all its citizens”. A survey in 1978 found that 54% of the world’s written constitutions refer to the sovereignty of the people.¹⁵³ Article 21 of the UN Declaration of Human Rights proclaims that the “will of the people shall be the basis of the authority of government”.

Could such statements, particularly those from authoritative sources, bolster the case for popular authority?

If the proposed statement in the Constitution’s preamble *did* have any influence, it would contradict its proposers’ express intention that “Care should be taken to draft the preamble in such a way that it does not have implications for the interpretation of the Constitution”.¹⁵⁴ But in any case, neither judicial authority nor constitutional text can overcome the conceptual problems with popular sovereignty. No amount of authority can make the illogical logical. Authoritative sources may solve some problems, particularly those outlined in [6.3.2-6.3.4]. An express constitutional statement may constitute popular consent, at least for the current generation. However, canonical statements cannot remedy the difficulties outlined in [6.3.6-6.3.7]. A statement in the Constitution does not make the Constitution more likely to conform with direct reasons. Furthermore, the declaration of popular consent only has salience because of the Constitution, and therefore cannot justify the Constitution. And to the extent that the canonical statement in a preamble purports to assert the people’s will as a legal reason, it is paradoxical. It is simultaneously part of a

152. Australia Constitutional Convention (1998) at 46.

153. Kay (1998) at 56, n 94.

154. Australia Constitutional Convention (1998) at 47.

constitutional enterprise which ignores other indications of the will of the people in favour of directives made in accordance with the Constitution.

6.6 The limited relevance of popular sovereignty

6.6.1 Popular sovereignty and democracy

The will of the people may provide limited support to constitutional legitimacy if it is identified with democracy.

Democracy is neither necessary nor sufficient for a regime's legitimacy [4.5]. However, a regime is more likely to be legitimate if it is democratic. For purely instrumental reasons, democratic regimes are more likely to make directives which accord with the direct reasons applicable to subjects [4.5.1]. To a limited extent, democracy promotes autonomy, the construction of personal identity, and respect [4.5.2-4.5.4]. However, these arguments do not show that a regime's legitimacy *depends* on democracy.

In any case, the "will of the people" cannot be equated simply with democracy. A dictator may claim to be articulating the will of the people - indeed to "know" what is the people's will better than people themselves. For example, Cromwell's Protectorate maintained the fiction that it spoke for the people even as it became less and less democratic, and even when most of the population would have supported the restoration of the monarchy.¹⁵⁵ Similarly, over the last decade, some members of the Australian High Court have invoked the will of the people to *justify* invalidating legislation approved by Parliament [11.4].

6.6.2 Government for the people

Some statements concerning the will of the people may be intended to imply merely that government ought to be *for* the people. The claim that government ought to be in the interests of the people is entirely consistent with the normal justification for authority. However, government *for* the people may not be government *by* the people.¹⁵⁶ Government *for* the people may nevertheless be despised and hated. Government *for* the people may be government *by* a despot, or by "representatives" whose actions are motivated by the *interests* of the people, rather than their desires and beliefs.

155. Morgan (1988) at 65, 75-76, 81-82, 91-92.

156. Zines (1997b) at 107.

6.6.3 Acquiescence

The will of the people is sometimes equated with the acquiescence of most people. Such acquiescence is necessary for a system of law to exist. Any system of authority and law is partly justified by the coordination and security which it seeks to provide. If a constitution lacks *de facto* authority, because it is not in fact obeyed by most people, then the constitution, and the system of law for which it provides, cannot provide coordination and security [3.1.2, 6.3.1]. If the Constitution is thought by most people to embody their desires, it should enjoy the acquiescence which is a necessary, but not sufficient, condition for justifying obedience to any constitution. In this limited sense, there is some truth in the claim that legitimacy depends on the will of the people.

Thus legitimacy is only connected with the will of the people in tenuous ways. Democracy may increase the likelihood that a regime is legitimate. Acquiescence is necessary to legitimacy. Legitimate government is for the people. But these claims are much weaker than the moral consequences usually attributed to the will of the people.

6.7 A desirable fiction

6.7.1 The uses of the fiction

“Popular sovereignty” is powerful rhetoric. But it is also difficult, if not impossible, to reconcile with reality. Morgan accepted that popular sovereignty is a fiction, and suggested that fictions are indispensable to government.¹⁵⁷ However, his comprehensive history of the fiction, and its influence over the political development of England and America in the 17th and 18th centuries does not prove his political theory.

Government requires the many (of the community) to submit to the few (who actually hold the reins of power). Morgan claimed that this submission necessarily requires the acceptance of fictions.¹⁵⁸ However, he did not explain why government cannot rely simply on honest justification. No doubt divine right, popular sovereignty, and variations upon these fictions were ubiquitous in England and America during the period of his study. But he adduced no evidence that it is *impossible* to justify government - either logically, or psychologically - without resorting to fictions. Even the association of the theory with the successful federation of the United States¹⁵⁹ does not demonstrate its universal desirability.

157. Morgan (1988) at 38.

158. Morgan (1988) at 13-14.

159. Morgan (1988) at 267-274, 280-282.

Indeed, the first century of Australian government suggests otherwise. The dominant justification for political institutions in Australia has been the overwhelming importance of the rule of law.¹⁶⁰ It is arguable that there is a fictional element - the rule of law is not conclusive because it provides insufficient reason to obey a wicked regime. Nevertheless, the fact that law is a necessary means to organise society is *part* of a persuasive justification for obeying law.¹⁶¹ Athens in the fifth century BC teaches a similar lesson: peace and prosperity followed when decrees based on popular sovereignty were subordinated to rule in accordance with a code of written law.¹⁶²

It may be that Morgan's claim should be read down to the proposition that fictions are necessary only in moments of constitutional crisis.¹⁶³ If so, fictions do not appear to be necessary in Australia which has, by and large, escaped constitutional crises.

Fuller's general analysis of fictions does not suggest that they are necessary for government. Fictions may be used to impose a desirable change which could not be implemented otherwise, or to satisfy a desire for continuity, or to avoid the need to reshape existing doctrine substantially, or because alternative intellectual apparatus are not evidently available.¹⁶⁴ Alternatively, a fiction may be a useful abbreviation, or a means to avoid highlighting an unpleasant truth, or simply a habit.¹⁶⁵ None of these reasons seems to apply to political legitimacy. Perfectly acceptable alternatives to the fiction of popular sovereignty exist - and if they do not, there is little reason to maintain the fiction at all.

Thus the claim that Australia either needs or would benefit from a legitimating fiction has not been demonstrated.

6.7.2 Inherent value of the fiction of popular sovereignty

Perhaps one can support adoption of the fiction on the basis that it carries desirable baggage. Perhaps popular sovereignty implies government with desirable characteristics¹⁶⁶ - in particular democracy and equal suffrage.¹⁶⁷

160. Dixon (1935) *passim*. Citations to this article and its companion piece, Dixon (1936) have been ubiquitous in the Australian constitutional theory literature.

161. See Chapter 10.

162. Ostwald (1986) at 523-524.

163. Morgan (1988) at 134 suggests this by his statement that: "contests ... generally stopped short of the appeals to high principle that signalize the breakdown of peaceful politics."

164. Fuller (1967) at 56-65.

165. Fuller (1967) at 81-87.

166. Morgan (1988) at 306.

However, the opinions of elected governors cannot be simply equated with the will of the people. At most, immediately after an election, one can say that “the people” would rather be governed by the newly elected government than their opponents. This choice will normally reflect popular judgments about both the relative competence of the new government, the charisma of its leadership, and preferences for particular policies. On any particular issue the new government may not represent the will of even a majority of the people.

Nevertheless, it is arguable that the ideal of government according to the will of the people implies government *by* the people. Whilst universal participation in all aspects of government may be impossible, representative democracy (and the desirable results with which it is generally associated) is the closest practical approximation. To some extent, therefore, the ideal of popular sovereignty suggests desirable forms of government. It may even be true that the rise of the ideal of popular sovereignty may propel a movement towards more direct and participatory democracy.¹⁶⁸

However, the fiction has little value if these desirable forms of government can equally be justified and implemented without resort to the fiction of popular sovereignty - as indeed they can. Surely the public justification for representative democracy can rely on its own merits rather than a fiction? To say the least, it is distasteful to implement desirable political structures by tricking those who will participate in them with specious rhetoric. As Bentham wrote,

Nor is any man now so far elevated above his fellows as that he should be indulged in the dangerous licence of cheating them for their own good.¹⁶⁹

6.7.3 Dangers of the fiction of popular sovereignty

Furthermore, like most political ideals, popular sovereignty may be abused. Indeed it has been trumpeted most loudly by some of history’s most unpleasant regimes,¹⁷⁰ including the Jacobin regime in revolutionary France, the Stalinist Soviet Union, and other “Peoples’ Republics”, which seldom showed much real concern for the people subject to them. The fiction was invoked with especial zeal in England during the Protectorate,¹⁷¹ an era whose

167. Finn (1995) at 22-24.

168. Finn (1995) at 24.

169. Bentham (1823) at 441.

170. Smallbone (1993) at 269.

171. Morgan (1988) at 55-66.

political theory and practice were regarded in retrospect with even more loathing than the Royalist excesses of Charles I.¹⁷²

The misuse of the rhetoric of popular sovereignty is readily explained. The people are not the governors - i.e. those empowered by a polity's law to make detailed decisions. The people are not governors either in a representative democracy, nor in any other practicable form of government for a large state. The will of the governors is therefore never identical to the will of the people. Because the will of the people cannot be identified, it will have apparent form only if the governors purport to express it. And there is no way to demonstrate that the governors' articulation is erroneous. The fiction of popular sovereignty purports to articulate the inarticulable, and to legitimate whatever actions governors desire and articulate.

6.8 Conclusion

The will of the people is inchoate, virtually irrelevant as a reason for action, and entails paradox. In Australian history it has not been regarded as legally significant. There are good reasons to eschew the recent enthusiasm for the concept both on and off the judicial bench. Other countries may be founded on a high-sounding fiction. Australia's fundamental norms are more prosaic, but they are sustained by more rigorous reasoning. Appeals to populist principles are ultimately a form of demagoguery which may facilitate strife as much as peace, oppression as much as autonomy, and arbitrariness as much as justice. Australians would be better to continue to live without resort to the fictitious will of the people.

172. Morgan (1988) at 96-97, 102.

Chapter 7 - The Founders

7.1 Introduction

A voluminous literature on “originalism” has considered whether the intentions of a constitution’s Founders¹ should be considered in interpreting that constitution.² This chapter has a slightly different focus. It asks whether any characteristics of the Founders of the Australian Constitution provide reasons to obey that Constitution - in other words, whether the Founders have, or had, authority to issue the Constitution as a directive.

The authority of the Founders is distinct from the authority of their intentions, or the effect of their intentions on constitutional interpretation.³ It is possible that the Founders had authority, but that any of their intentions unexpressed in the Constitution should be ignored in constitutional interpretation.⁴ Conversely, the Constitution may have authority, and there may be good reasons to consider the Founders’ intentions in its interpretation, even though the Founders themselves lack authority. This chapter will show that the Founders have at best very limited authority. The characteristics of the Founders provide little if any reason to obey the Constitution. However, it may well be that the Convention Debates, and other materials from the time when the Constitution was drafted, should be used in Constitutional interpretation because they provide a determinate context necessary to narrow the possible meanings of the Constitution’s text, and so improve its capacity to coordinate.

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1. In an Australian context, the “Founders” include at least the Constitutional Convention delegates. Who exactly counts as a “Founder” is controversial, and ultimately depends on the reasons for paying attention to them: see below at fn 41.
 2. Many of the key American texts are reprinted in Rakove (1990), including articles by Meese, Brennan, Graglia, Powell, Lofgren, Hutson, Bork, Brest and Monaghan. Other important articles in the vast American literature include ; Grey (1975); Munzer & Nickel (1977); Lyons (1986); Kay (1988); Farber (1989). The scant Australian references were collected in Thomson (1982). The Australian literature then expanded in 1986 when the Convention Debates were republished after more than 80 years, together with an index for the first time, and when High Court attitudes to the Debates shifted radically in *Cole* (1988): see the essays in Craven (1986b); and Craven (1990); Schoff (1994); McCamish (1996); Goldsworthy (1997); Stoljar (1998).
 3. Alexander (1995) at 358-359 is careful to separate these questions.
 4. Obviously the questions are related: the reasons for attributing authority to the Founders or to the Constitutional text may in addition determine who counts as a “Founder”, how their intentions should be calculated, and how to use these intentions in interpreting the Constitution: Dworkin (1986) at 320-321.

7.2 Consent theories

The authority of the Founders may be premised on theories of political obligation which depend on consent. The Founders may be seen as the best available approximation to the popular will. As Craven put it:

In the absence of subsequent constitutional amendment, [the Constitution] continues to comprise the latest authentic expression of the will of the people of Australia on the subject of their nation's constitutional dispositions.⁵

The implied argument is that (1) the will of the people provides moral reasons for action, (2) the Founders provide the best available reflection of the will of the people, and (3) as the Constitution embodies the views of the Founders, and therefore the will of the people, it should be obeyed.

Step (1) is false. In the last chapter I explored and rejected the claim that the will of the people provides a moral reason for obedience to the Constitution. I also described the shortcomings in the process for adopting the Constitution, which impair its claim to be truly “democratic”.

Even if one concedes step (1) - that there might be reason to obey the will of the people - step (2) is doubtful. Why do the Founders provide the best available approximation to the will of the people? Why is the will of long-dead Founders “the same as” the will of the people today?⁶ Long-dead Founders seem a less accurate mouthpiece for the people of today than, say, the majority of a recently elected Parliament with a manifesto commitment to a policy which is in fact unconstitutional. One might claim that the Founders are a better approximation than the recently elected Parliament, but a worse approximation than views expressed in a Constitutional referendum.⁷ But why would one grant the authority of a referendum and not a Parliament? To insist on a super-majoritarian process such as a referendum assumes that the will of the Australian people can *only* be legitimately expressed according to the procedure dictated by the Founders. It is circular to claim that, by approximating the will of the people in 1900, the Founders can control what counts as the will of the people a century later.

Perhaps one could argue that the will of the people is only validly expressed in referenda. Then the referenda of 1899-1900 would be a better approximation to the will of

5. Craven (1992c) at 894; see also Craven (1990) at 177-178, 180. For references to similar arguments in the United States, see Farber (1989) at 1097-1098.

6. Strauss (1986) at 928-929.

7. Craven (1990) at 180.

the people than anything save subsequent referenda. This theory is hard to accept. Nothing justifies the assumption that a 100 year old referendum is inherently superior as an expression of the will of the people when compared to, say, voters in a contemporary election who elect a Commonwealth government with a manifesto to arrogate significant power irrespective of the Constitution. But even if one accepts the assumption, then the “Founders” are the voters in the Constitutional referenda, for it would be their will which provided the Constitution with authority. Claims that they had delegated their authority to Convention delegates would be unsustainable, for the assumption of this theory is that only a referendum can genuinely express the will of the people.

In summary, claims that the Founders supply the Constitution with authority because they reflect the will of the people are insupportable because:

- consent provides no reason to obey political norms; and
- as a reflection of the will of the people, a contemporary Parliament can be at least as good as a 100 year old referendum.

7.3 Founders as coordinators

The authority of the Founders might rest on their superior ability to coordinate. In 1900 many of the Australian Founders were influential and prominent, both as respected individuals, and as the holders of office within existing political structures. With the added mandate of popular election, they were well-placed to issue directives so salient that most members of the community would notice them. The Founders had effective political power to shape events so that various schemes of coordination chosen by them were ultimately implemented. However, they could only assure implementation by employing existing forms of legal authority - i.e. the Imperial Parliament. Without that legal cloak, popular obedience to the Founders was unlikely. *De iure* legal authority was a necessary condition of legitimacy. Despite their salience in nineteenth century political life, the Founders *by themselves* lacked *de facto* authority, and therefore legitimate authority. Merely as prominent, elected individuals, the Founders lacked the practical capacity to coordinate. Equally, today it is inconceivable that the decisions of the Founders, *qua* Founders, would be used as a means to achieve coordination. Without *de iure* legal authority, the Founders could not deliver the coordination which would ultimately justify obedience.

However, in an important sense, the Founders did have legitimate authority: those of their opinions translated into the Constitution’s text and promulgated by the Imperial Parliament can coordinate people today towards worthwhile ends. The Constitution’s text is

salient partly because of its history of popular approval in 1899-1900, but also because of its legal status as an Act of the Imperial Parliament. And because of its legal - and therefore coercive - status, it also solves prisoner's dilemma problems. The Founders are *part* of a historic legal system whose results had, and have, authority. As this makes clear, however, the Founders' opinions which were not part of the process - those opinions *not* translated into Constitutional text - cannot claim the same authority. The Founders *derive* their authority from their participation in the authoritative process which enacted the Constitution; they do not *confer* authority on the Constitution.

It is arguable that the Founder's opinions are relevant to explaining the textual meaning of the Constitution when it is ambiguous. Using the Founders' intentions this way may be justified because it provides greater certainty about the text's meaning, and increases its capacity to coordinate.⁸ However, here again the authority of the Founders depends on the authority of the Constitution, it does not *justify* it.

7.4 Founders' wisdom

Alternatively, the Founders may have authority because the circumstances of drafting the Australian Constitution were more conducive to good decisions than processes today. It is at least arguable that the Founders were less motivated by self-interest and institutional interest than people today, and so their judgments are more likely to be for the common good. The force of this argument depends on the particular history of Australia, and does not *necessarily* apply to every constitution in every country.

Ideally, a political decision-maker should give the interests of others equivalent weight to his or her own interests - a balance which I shall describe as the "common good".⁹ Alternatively a decision-maker may be influenced solely by self interest. Many decisions, of course, will be intermediate, paying *some* regard to the interests of others but failing to accord them a weight truly equivalent to one's own interest.

Decision makers may also be influenced by an institution in which they participate. They may seek to enhance the power and prestige of their own institution, either to enhance their own power and prestige, or because participation in the institution has increased their belief in its virtues compared to those of other institutions they know less well. These institutional interests may be more seductive because they are not obviously self-interested,

8. But cf the arguments against such "moderate originalism" summarised at [7.7].

9. See Finnis (1998) 111-123 for a more detailed examination of this concept.

and can often be portrayed, however inaccurately, as contributing to the common good. It is not always easy to distinguish between the common good, and the good of those involved in an institution which itself is part of complex social interactions.

Well-designed institutions promote the common good, rather than self-interest or institutional interest. The very requirement to articulate reasons which are not transparently self-interested may tend to produce decisions which are in fact less self-interested.¹⁰

Participants in the Constitutional Conventions were constrained in various ways to frame arguments for their positions in terms of the common good. But in this respect they differ little from contemporary parliaments, and contemporary courts.

However, some features of the Constitutional Conventions were more likely to encourage genuine deliberation than contemporary parliaments. The Founders in Australia were not entirely impartial - for example they were all but universally hostile to the interests of Asian immigrants.¹¹ Nevertheless, in important respects the Founders lacked institutional self-interest. Many were not likely to seek election or appointment to the new bodies they were creating. As was illustrated by the recent Republican Constitutional Convention, the business of constitution making, rather than ordinary politics, may itself encourage individuals to be independent of party and caucus. Knowing that a constitution is likely to endure “is likely to import a seriousness and intensity to the constituent decisions that cannot be reproduced every time a constitutional dispute arises”.¹² At Constitutional Conventions, both before 1900, and in 1998, constitutional issues often cut across conventional political divisions, so that delegates were less subject to party discipline, and more open to argument.¹³ Delegates to the Constitutional Conventions before 1900, with less self-interest, less

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10. Elster (1998) at 101-105 explores why articulated deliberation (i.e. argument), even by self-interested actors is more likely than mere bargaining to promote the common good.
 11. Introducing what became the “race power” in s 51(26), Griffith commented that “the introduction of an alien race in considerable numbers into any part of the Commonwealth is a danger to the whole of the Commonwealth”: *Australasian Convention Debates, Sydney* (1891) at 525. Cf Brest (1990) at 247 outlining the biases of the Founders of the United States towards the interests of white male property-holders, and creditors rather than debtors.
 12. Kay (1988) at 44.
 13. Obviously there were consistent patterns in the Convention votes, but there was no concept of a “government” or a “ministry”. Thus, whilst even early sessions of the Commonwealth Parliament had “pairs” of members from opposite parties, there was no equivalent institution at the Constitutional Conventions.

institutional interest, less party discipline, and a shared sense of historic purpose, may thus have made better decisions than would parliamentarians today.¹⁴

The Constitutional Conventions do not compare so favourably to a contemporary court. Judges are obviously not subject to party discipline, as the High Court's perpetually shifting majorities show. But in an important respect, judges *are* subject to institutional interests from which the Founders were largely free. Many of the Founders were not sure whether they would become Federal rather than State politicians; very few consciously considered that they might become judges of the new High Court; some doubtless did not expect to hold public office in the new Federation; and the only institution of which they were all members - the Convention - clearly had no future. By contrast, High Court Justices are all members of a continuing institution with which they identify, and in whose power and prestige they have a vested and continuing interest. This institutional interest has little effect on many questions decided by the judiciary, such as the federal distribution of powers or electoral provisions.¹⁵ However, the judicial institutional interest is vitally involved in delimiting "judicial power" and defining its consequences; and it is equally involved when the Court defines individual constitutional rights, thereby in effect defining which questions will subsequently fall for judicial, rather than merely legislative, determination.

Nevertheless, contemporary legislatures and courts are inevitably tempted to consider that in some respects they are *more* expert than the Founders. Today's institutions have the advantages of a century of hindsight, as well as concrete knowledge about particular social and technological changes unimaginable in 1900.¹⁶ To the extent that they have committed moral views, they are bound to consider these to be better grounded than those of the Founders.¹⁷

At best it is a weak argument that the Founders were more expert than members of institutions today. In an age sceptical of ancestral wisdom, the argument is weak.

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14. Kay (1998) at 44 also suggests that decisions about general rules are less subject to the emotions aroused by a particular case; but this invokes all of the usual arguments both for and against act and rule utilitarianism.
 15. The more cynical might also accuse the High Court of a vested interest in the power of the Commonwealth over the States because of the Court's physical location in Canberra, and the Commonwealth's involvement in appointing the Court's members, and in supporting its bureaucracy.
 16. Marmor (1992) at 182.
 17. The statement "I believe that X is morally right" necessarily implies that "it is the case the X is morally right": see Finnis (1983) at 2-3.

7.5 Founders as limiters of judiciary

A final argument for the Founders' authority is that their intentions are more effective than the alternatives in constraining judicial value choices.¹⁸ This presupposes that judicial value choices *should* be constrained.

Obviously judicial value choices should be constrained if they would overturn the more enlightened value choices of other institutions or individuals. Judicial value choices should be constrained *by the Founders* if judicial value choices are less enlightened, or less able to coordinate towards worthwhile ends, than the value choices of the Founders. These possibilities have already been discussed in [7.3-7.4].

Even if judicial value choices *are* more enlightened than those of other institutions or individuals, it may be desirable to constrain judicial value choices to serve rule of law values. If judges *are* more enlightened, and individuals generally reason less well than judges, then individuals will sometimes be unable to predict judicial value choices.¹⁹ The value of autonomy depends on individuals being able to make effective choices to plan their own futures; such plans often depend on the reaction of the state; and so planning would be undermined if official responses were unpredictable.²⁰ Furthermore, it is *prima facie* undesirable to coerce individuals according to norms which they cannot predict.

It does not follow that predictability of official action is paramount. Coercing individuals to act well is sometimes more important than respecting their autonomy. Nevertheless, if law consists of rules which promote autonomy then *some* judicial value choices, even correct choices, should be constrained.²¹

On this basis, perhaps one should obey the will of the Founders if it assists individuals to predict official action.²² But this only follows if analysing the will of the historical Founders will provide more predictable guidance of official action than alternative norms of

18. Scalia (1989) at 863; Kay (1988) at 258-259.

19. Unless, that is, an individual can somehow put aside her own moral reasoning, and engage in the moral reasoning which judges would use, even though she would personally reject its results.

20. For a more detailed discussion of the rule of law and its promotion of autonomy, see Finnis (1980) at 272-273; Fuller (1969) at 162-163.

21. Feldman (1992) at 1414-1417 draws attention to the value of "honoring expectations" as reasons for judges not to make value choices, even if they are right.

22. Craven (1992a) at 2 claims that the argument from certainty depends on the argument that there are other reasons to accord authority to the Founders. Otherwise, he claims, using historical intent "becomes an arbitrary and essentially accidental interpretative process, and as such logically

constitutional interpretation. And this depends on the certainty of historical sources compared to other bases for judicial decision. The relevant question is whether historical sources provide *less* guidance than other alternatives, such as moral, economic, or linguistic analyses.²³ At best, historical sources provide limited guidance.²⁴ This is unsurprising: the Founders were often principally concerned with matters *not* the subject of controversy today. History often provides little real brake on judicial value choices.²⁵ For example, in *Ha* (1997), the majority found that the history of s.90 and its historical purpose accorded with an extremely wide prohibition on State taxes, a result which they also favoured substantively.²⁶ The minority read the historical record to the opposite conclusion.²⁷

Even if the Founders' will is more constraining than other possible sources, the rule of law argument does not show that the Founders supply the Constitution with legitimacy. It merely shows that if there is to be official coercion, it might better be guided by the Founders than by other possible sources. The rule of law argument does not show that official coercion is justified in the first place. Because the Constitution *empowers* official coercion, a more substantive justification is needed for it than a bare claim that the Constitution justifiably *restricts* official action. But if a substantive justification for the Constitution can be found, if the will of the Founders does indeed constrain judges more than other potential sources, and if the Constitution reflects the will of the Founders, then there is an additional ground for obedience to the Constitution

indefensible." However if historical intent is the most effective means to provide certainty about official action, then appeals to it are not "arbitrary", nor are they "logically indefensible".

23. Craven (1990) at 179 claims that the important objective is to prevent judges making *concealed* value choices. The question then is whether judges are more prone to manipulate historical arguments than economic or linguistic arguments. However, what is inherently wrong with concealed judicial value choices? If those choices are right, and do not infringe excessively on individual autonomy it does not matter that they are concealed. And if they are wrong, or frustrate individual planning, their vice lies in their fallacy rather than their concealment. But perhaps one could argue that concealed choices, because they are not explicitly defended, are more likely to be incorrect.
24. Coper (1986) at 17-21 provides a number of constitutional questions where history provides little guidance.
25. Murphy (1978) at 1770 claims that history is *less* constraining than other interpretive approaches because it is based on the myth that there is a single intent on a particular matter. Easterbrook (1988) at 62-63 also argues that applying intent rather than the text of the statute increases judicial discretion because judges can frame the hypothetical question to be asked, and the hypothetical body which is asked that question. Nevertheless, a shared actual intent on some questions is surely plausible.
26. *Ha* (1997) at 494-496.
27. *Ha* (1997) at 507-508; see also *Capital Duplicators [No 2]* at 606-608 per Dawson J.

7.6 Sovereignty and authority

7.6.1 Authority and persons

Some have reasoned backwards from the authority of the Constitution to ground the authority of the Founders. Surely if the constitutional text has authority, then those who wrote it must have had authority?²⁸

This syllogism has most appeal if law is simply the command of a sovereign. If commands should be obeyed if and only if they are the commands of a sovereign, then presumably the sovereign has some quality which invests those commands with moral force. But the shortcomings of this model have already been explored.²⁹ Austin's concept of law as a command should be rejected in favour of theories of authority. Law is better analysed as the authoritative directives of a regime. A "regime" might equally be a complex institutional process as a person [3.4]. Such a theory of authority might identify a discrete set of *directives*, but not *lawmakers*, as authoritative. Then the Constitution, promulgated according to the set of constitutional rules governing the Imperial Parliament, could have authority, irrespective of the precise identity of its "authors".³⁰

7.6.2 Legitimacy

But the question of legitimacy remains. Can directives have *legitimate* authority if their authors do not? Whilst it is *possible* for a series of random norms to have authority, it is most unlikely that obedience to them would meet the normal justification for authority. A directive is legitimate only if obedience to the directive accords better with direct reasons than independent decision making [3.1.2]. Rational and conscientious individuals are unlikely to do better by applying a directive unless (1) the maker of the directive had more expertise, or (2) the directive coordinates the acts of several individuals in desirable ways. Kay argued that only the directives of a rational individual are likely to meet these conditions.³¹ On this theory, a constitutional text can only be legitimate if it reproduces the rational judgments of its drafters.

However, a process which identifies particular texts as authoritative may incorporate the views of rational individuals so that its outcome is likely to meet the normal justification.

28. Kay (1988) at 231-235, 249 appears to proceed on this basis, as do Craven (1990) at 177; Perry (1998) at 100.

29. Chapter 2.

30. Schauer (1982), Hurd (1990), Hurd (1995), and Waldron (1995) developed theories of legislative text along these lines.

At the same time, the process may be defined so as not to give any individual, or even any discrete body, complete effective control over the text which becomes authoritative. Indeed a process involving a number of stages may be *more* likely to meet the normal justification because it minimises the temptations of self-interest. Furthermore, specifying texts as authoritative if they have emerged from a distinctive process provides the clarity desirable for a rule of law. Thus the outcome of a legislative process may be *more* legitimate than the command of an individual.

However, Kay's claim has some force. The directives identified by a process can only be legitimate if the process *involves* rational individuals either more expert than subjects, or able to identify worthwhile goals for cooperative endeavour.

7.6.3 Authority and communication

Alexander made a similar claim that authoritative directives must have an authoritative author. He assumed that texts are communications from personified authors.³² He accepted that authoritative norms may require applying texts by reference to the conventional meaning of the text rather than the author's meaning.³³ But he insisted that the process of doing so "reauthors" the text.³⁴

This model is an awkward description of texts produced by a complex institutional process. Different individuals may contribute to different parts of the text, and different individuals may have different intentions in agreeing to some parts of the text. Who is the "author" of the "reauthored" text? One possibility is that the text's "authors" are those who agreed to the final text - even though many of them may not have considered much of the text at all. Alternatively, different parts of the text may have different authors - which denies the apparent unity of the text. Finally, the "author" might be the interpreter of the text. However, the essential idea of an "author" is someone who communicates *to* the interpreter.

Alexander's model appeals because it relies on an instinctive model of communication which Reddy dubbed the "conduit metaphor". A huge variety of English expressions about language rely on a physical analogy: speakers "put" ideas into the "package" or "pipe" of

31. Kay (1988) at 231-235, 249; see also Craven (1990) at 177; Perry (1998) at 100.

32. Alexander (1995) at 362-363. A similar assumption lies behind the claims of Kay (1988) at 230, and Craven (1990) at 177, that a text can only be used if there is a real or presumed intention behind it.

33. Alexander (1995) at 397-399.

34. Alexander (1995) at 402-403.

language, from which listeners “retrieve” them.³⁵ But as Reddy pointed out, we are not bound by this metaphor for language. An alternative, legal, model is that texts, with conventional meanings, may emerge from complex processes involving a number of rational individuals. These texts incorporate *some* of the views of those people involved in the processes which identify the texts as authoritative. And these people communicate some of their ideas to the readers of the statute. Thus a meaningful text can be created, and communication can occur, without a single identifiable author.

In one sense, however, a text with multiple drafters is “reauthored”. In interpreting a legal text it is invariably presumed that various sections are coherent.³⁶ Strained textual meanings are adopted so that the text is not self-contradictory, and does not promote contradictory purposes.³⁷

These presumptions are also applied in reading a non-legal text of a single author. They follow from Grice’s “Cooperative Principle” - in communicating, people generally do not say what they believe to be false³⁸ - and at least one of two contradictory statements is usually false. Thus a single author is presumed not to be self-contradictory. The same presumption cannot necessarily be applied to the statements of two or more different authors - there is no reason to believe that they did not intend to contradict each other.

Thus applying the presumption of coherence treats a legal text *as if* it had a single author. But the *reasons* for the presumption are different. In law, coherence is presumed partly to avoid imposing contradictory coercive norms upon an individual.³⁹ Coherence in law is also presumed because the justification for having law is its capacity to direct desirable conduct. At least one of two contradictory laws must fail to fulfil this function.⁴⁰ Thus there are reasons to treat legal texts as coherent, and to apply legal norms *as if* they had a single author. But this does not imply that the text *does* have a single author, or that the text’s legitimacy depends on it having a real or fictional single author.

35. Reddy (1979) at 287-292, 311-320. Reddy provides pages of examples such as “the sentence was filled with emotion”; “his words were hollow”.

36. Dworkin (1986) at 225.

37. Whilst statutes seldom have contradictory purposes, they often have conflicting purposes.

38. Leech (1983) at 7-8.

39. Fuller (1969) at 65-70.

40. The two laws might be incompatible means of cooperation; but then applying both would frustrate the cooperative end.

In conclusion, theories of authority do not imply that the Founders had authority. There is a strong instinct to personify legal text. Many other kinds of texts have a single identifiable author. In many situations of ordinary life, orders are given by a single, identifiable person. But common as these experiences are, they are an inadequate model for legal texts and legal institutions. Most legal texts, including the Australian Constitution, are the product of a number of authors, and are identified by conformity with an institutional process rather than by their author. Such texts are still the artefacts of rational human endeavour. Those involved in producing them invariably try, and usually succeed, in communicating. But this does not commit us to analysing these texts “as if” they had a personified, responsible, authoritative author. The Constitution can have authority, even if its “authors” did not.

It would be disturbing if a text could be authoritative only if its “authors” had authority. Previous sections have shown that the reasons to accord the Founders authority are weak at best. If the author-driven theory of a authority were true, then because its authors lacked authority, the Constitution would also lack authority.

7.7 **Other objections**

Let us imagine that there is a coherent reason for according authority to the Founders, whether it be their reflection of the will of the people, their moral expertise, their ability to coordinate, or their constraint on judicial value choices. Any attempt to legitimate the authority of the Founders must also confront a number of objections now notorious in the literature:

- (1) There is no single way to define who counts as a Founder.⁴¹
- (1) There is no single way to define how to combine the intentions of the Founders.⁴²

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41. Possibilities include the authors of the first draft of the Constitution; the members of the committee which altered it; the members of the Convention which considered, altered, and approved it; the members of the various State Parliaments who approved it; the electors who voted for it in referenda, or the members of the Imperial Parliament who approved it: Dworkin (1986) at 318-319, 361; Donaghue (1996) at 151-152. Cf Kay (1988) at 246-247 suggesting as the Founders those who “by their approval, [gave] the Constitution the sanction of law” - i.e. the Imperial Parliament; cf Craven (1990) at 180-181 suggesting as the Founders those who deliberated upon the precise form of the text - i.e. the Convention delegates.
 42. Wofford (1964) at 507-509; Dworkin (1986) at 320-321. See also Waldron (1995) at 355 suggesting that *any* agreement between Founders is unlikely given their plurality of backgrounds and ideologies. Cf MacCallum (1968) at 247-273 suggesting that actual or deemed shared intention is sometimes plausible, and its use may be justified according to a legal convention particular to that legal system. And cf Kay (1988) at 248-249 suggesting that from the viewpoint of popular sovereignty, an opinion of a *majority* of the Founders is sufficient. However, Kay’s suggestion depends on the argument rejected in [7.2], that representing majoritarian consent supplies the Founders with legitimate authority.

- (1) There is often (as a matter of fact) no agreement between the Founders.⁴³
- (1) It is not always possible (as a matter of history) to know what the Founders intended.⁴⁴
- (1) The historical record is skewed, so that it is not possible to know *reliably* what the Founders intended.⁴⁵
- (1) Because understandings of morality have changed, the intentions of the Founders are sometimes no longer morally appealing.⁴⁶
- (1) Because social conditions and technology have changed, sometimes the intentions of the Founders are no longer morally appealing⁴⁷ and fail to encompass new problems.⁴⁸
- (1) The “meaning” of a past intention might have depended on many features in the past; because some of these features have changed, and there is no way of identifying which historic features were crucial, the application of intention in the present then requires a “value choice” anyway.⁴⁹
- (1) There is no way to choose between the Founders’ intentions about specific norms, and their intentions about more general norms; the application of these general intentions is indistinguishable from moral reasoning independent of the Founders’ intentions.⁵⁰

43. Coper (1986) at 17-21 showing the lack of agreement about the meaning of a number of textually ambiguous constitutional provisions.

44. Wofford (1964) at 503-506; Farber (1989) at 1088-1089. As they point out, the United States has no official record of the convention debates, which compounds the problems. Cf Kay (1988) at 243-244 pointing out that absolute certainty about a historical event is impossible, but that knowledge of the most likely historical intention is sufficient. But cf Brest (1990) at 240-241 denying that a “more likely” intent is sufficient.

45. Burmester (1986) at 36.

46. Munzer & Nickel (1977) at 1033; Brest (1990) at 240 citing changing attitudes to death as a reason to revise our understanding of “cruel”, an example further discussed in Farber (1989) at 1094.

47. Kay (1988) at 288-289 citing changes in economic conditions which provide good reasons for government to abridge contracts; Lessig (1993) at 1174-1182 claiming that changes in context require “translation” of the original text.

48. Farber (1989) at 1093. The classic Australian example is the extension of the Commonwealth’s power in s 51(5) over “postal, telegraphic, telephonic and other like services” to include broadcasting: see *Brislan* (1935).

49. Lessig (1993).

50. MacCallum (1968) at 239-247; Dworkin (1986) at 329-337, 361-363; Brest (1990) at 236-237; Farber (1989) at 1094-1095. Cf Kay (1988) at 255 appearing to suggest that the relevant “category” - or level of abstraction - can be established as a matter of intention. Cf Craven (1990) at 179 implicitly suggesting that a higher level of generality should be sought if and only if the historical record is

- (1) Using the Founders' intentions *reduces* certainty because opinions about them are liable to be overturned by historical research.⁵¹
- (1) The Founders did not intend their intentions to have legal significance.⁵²
- (1) Judicial practice does not accord the Founders authority.⁵³

Some of these objections have less force than is commonly imagined. Many would lose their sting if a coherent political theory justified the use of the Founders' intentions, and thus provided a base for defining what constitutes the "Founders' intentions". More importantly, however, most of these objections were developed in the context of debates about using the Founders' intentions *beyond* the clear textual meaning of a constitution, usually to assist in elucidating that constitution. None of the objections apply if authority is possessed by the Founders' intentions only to the extent that they were manifested in the Constitution's text.

However, one objection must be faced. If the Founders have authority, then why does the *Constitution* have a privileged status? Why does the text have priority over other intentions of the Founders not translated into Constitutional text? Perhaps the answer is that giving priority to the Constitution's text answers the above set of objections. The Constitutional text, as distinct from other intentions, was approved by anyone who might count as a Founder, according to a process which defined how their intentions should be combined, and was unambiguously agreed. The text specifies a level of generality, is not

ambiguous at a more specific level. Farber (1989) at 1087 claims that the appropriate level of generality may depend on the justification for according authority to the Founders.

- 51. Brest (1990) at 248.
- 52. In the United States, see Brest (1990) at 236; Powell (1990); but cf Lofgren (1990), Kay (1988) at 273-281 disputing Powell's reading of the historical evidence. Lyons (1993) at 151-154 suggests that the broad terms of some of the clauses of the United States Constitution are themselves evidence that the Founders did not intend their intentions to be authoritative; cf Graglia (1990) at 42-44, Kay (1988) at 266-273 denying that these clauses were considered when enacted to have such a broad operation. The Australian position is little researched, but see Thomson (1982) at 322, n 61 suggesting evidence of a historical intent that historical intent should not be used in interpretation of the Australian Constitution, and cf Craven (1990) at 176 disputing this view.
As Kay (1981) at 192-193 points out, the historical argument is academic: there may be preconstitutional reasons to ignore the Founders' intentions about the correct *method* of interpretation, but to use the Founders' intentions about the *content* of particular constitutional provisions.
- 53. In the United States, see Munzer & Nickel (1977) at 1032; Monaghan (1990) at 266-272 (originalism "entails a massive repudiation of the present constitutional order") Kay (1988) at 227; Strauss (1996) at 920-921. Again this problem is greater in the United States than in Australia, where divergence between original intent and judicial practice is not so glaringly obvious. In any case, as Craven (1990) at 181-182 points out, the argument is one of pragmatism rather than principle.

liable to further historical discoveries, was intended to have legal significance, and has long been prominent in judicial decisions.

7.8 Conclusion

It is tenuous to derive the Constitution's authority from the authority of the Founders. The Founders were capable of coordinating, but only if their actions were themselves implemented by authoritative legal norms. The Founders have relatively little extra expertise to deal with contemporary problems when compared to contemporary decision makers.

Whilst the will of the Founders might provide some constraint on judicial decisions, improving their predictability, this does not suggest that the will of the Founders is usually a sufficient reason for action. At most we can suggest that there are limited reasons to treat particular acts and intentions of the Founders as providing reasons for action. These reasons are strongest for those intentions of the Founders which were in fact translated into the Constitution's text.

The Founders' intentions beyond the text may nevertheless be *relevant* to constitutional interpretation. Given that the Constitution has authority, perhaps we should have regard to the intentions of those originally involved in drafting and ratifying the Constitution. But then those intentions have authority derived *from* the enactment of the Constitution; they are not part of the justification *for* obedience to the Constitution.

Chapter 8 - The Federal Compact

The Commonwealth Constitution can be seen as a “compact”. The legal institution of contract and the moral institution of promising provide analogies for the public law analysis of the Constitution.

Historically the High Court usually discouraged these analogies. Some judges decried them as simply inapplicable, because the Constitution’s legal validity depends on an Act of Parliament, not an agreement. Others were content to view the Constitution as a contract between *people*, but not as a contract between *States*. In the limited circumstances where principles of constitutional and contractual interpretation might differ, the Court usually both rejected the notion of a federal compact and the application to the Constitution of principles of contractual interpretation.

Although it is clear that the *legal* force of the Constitution does not flow from its status as a compact, the idea of a federal compact may have more *moral* force than many appreciate. The moral consequences of the Constitution embodying a compact may affect legal interpretation. However, the effect is marginal, because the Constitution’s embodiment of a federal compact is at best one reason amongst several to obey the Constitution.

8.1 Whose compact?

Who are the parties to the Constitutional compact? The people of Australia, the people of each federating colony, or the federating colonies as polities? After showing why the first two possibilities are incoherent as moral arguments, I will investigate the last possibility in more depth.

8.1.1 The People’s compact

The majority in the *Engineers’ Case* (1920) insisted that the Constitution “is the political compact of the whole of the people of Australia”.¹ The *compact* or *agreement* of the people, if it did exist, might be more morally significant than the mere *consent* of the people. A compact invokes the usual justifications for promise-giving and promise-keeping. The institution of promising facilitates cooperative action over time, improves predictability, enhances autonomy by providing a means for an individual to plan so as to maximise the

1. *Engineers’ Case* (1920) at 142 per Knox CJ, Isaacs, Rich and Starke JJ, see also at 160; similarly see *Incorporation Case* (1990) at 504 per Deane J; *Stevens* (1993) at 461 per Deane J.

effectiveness of his or her own initiatives; and supplies a structure for rational impartiality.² Promise-keeping also provides a technique for promoting collective action whilst also respecting the moral autonomy of others to choose their own ends.³ The compact of the people invokes at least these usual justifications for promise-keeping, although it has special features because it purports to override all other promises.

It is not clear whether this “compact of the people” involves the persons who lived in the place which became Australia in 1901, or “the people” as a corporate entity. Either way, it is very similar to the claim that the Constitution’s moral and legal authority derives from the “will of the people”. It shares many of its defects [6.3]: most of the people did not agree; the agreement imposes no obligation on those who dissent; the agreement of a previous generation does not generate reasons for action today; and at best the agreement of the people is an additional reason for action, neither necessary nor sufficient to create an obligation of obedience.

Some of these objections have particular force because the claim is based in contract. It is axiomatic that a contract only binds one who agrees to it, or one who at least appears to agree. Relatively few people actually agreed to the “compact of the people” in 1899-1900, and none of them are alive today. Furthermore, no contract can bind a person who actively refuses to be a party.⁴ Whatever moral force a compact between people might have, it is irrelevant to analysis of the Commonwealth Constitution today.

But perhaps “the people” as a corporate entity has an ongoing personality. Ordinary language attributes a continuing existence to “the people of Australia” even though the members of this group change as individuals are born, cross borders, or die. What if this abstract body is party to the compact? Let us pass over the difficulty that it may be inappropriate to employ the legal fiction of a community’s moral or legal personality [8.2.2]. There is still an intractable dilemma. On the one hand, if “the People” is a unified but abstract entity, then there is no *other* party to the compact. A contract with oneself is morally and legally insignificant. On the other hand, if “the People” consists of a number of contracting individuals, then there is no continuity between the contractors and those who are alive today.

2. Finnis (1980) at 298-308, particularly at 303-304.

3. Fried (1981) at 11-17.

4. Stokes (1994) at 266-267.

8.1.2 Compact of the people of the colonies

It is more accurate historically to see the Constitution as embodying not the compact of the Australian people, but the compact of the people of each federating colony. The Constitution was approved colony by colony. If the people of Western Australia had rejected the Constitution, for example, they would not have been included in the new Commonwealth of Australia.⁵

One version of this theory emphatically denies that these people acted corporately:

The Constitution of Australia was established not pursuant to any compact between the Australian Colonies but, as the preamble of the Constitution emphatically declares, pursuant to the agreement of “the people” of those Colonies.⁶

And, drawing on the language of the preamble to the Constitution, Brennan, Deane and Toohey JJ said:

The Constitution was enacted to give effect to the agreement reached by the people of New South Wales, Victoria, South Australia, Queensland, Tasmania and Western Australia to unite ‘in one indissoluble Federal Commonwealth’. The Constitution is no ordinary statute; it is the instrument designed to fulfil the objectives of the federal compact.⁷

However, the notion of a compact between the people of the colonies as individuals faces many of the same objections as the less specific “consent of the people”: most of the people did not agree; an agreement imposes no obligation on those who dissent; and the agreement of a previous generation does not generate reasons for action today. The compact theory can be sustained only if we accept precisely what Deane J denied: the compact was between the colonies as ongoing political entities, each of which manifested its agreement as a corporate body through legislation and subsequent referendum. By contrast, the compact of “the people of the Colonies” is a fiction, and morally irrelevant today.

8.1.3 Compact of States

It is more fruitful to analyse the Constitution as a federal compact between the political communities of the pre-Federation colonies, and their successors in title, the Australian States. This was the view taken of the Constitution in a number of judgments

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5. *Commonwealth of Australia Constitution Act (UK) 1900*, s 3. A note on terminology for this chapter: I shall use “Commonwealth of Australia” to refer to the entire polity of Australia, including both Federal and State institutions. I shall use “Commonwealth” to refer to the Federal polity as distinct from the State polities.
 6. *Re Duncan* (1983) at 589 per Deane J. See also *Leeth* (1992) at 484 per Deane and Toohey JJ; *Hematite* (1983) at 660 per Deane J.
 7. *Capital Duplicators [No 1]* (1992) at 274 per Brennan, Deane and Toohey JJ; see also *Tasmania v Commonwealth* (1904) at 359-360 per O’Connor J; *Spratt* (1965) at 247 per Barwick CJ; *Leeth* (1992) at 484 per Deane and Toohey JJ; *Kruger* (1997) at 41-42 per Brennan CJ.

before the *Engineers' Case* (1920). In the *Railway Servants' Case*, Griffith CJ for the Court said that

The Constitution Act is not only an Act of the Imperial legislature, but it embodies a compact entered into between the six Australian Colonies which formed the Commonwealth.⁸

Moore's classic text adopted the claim that the Constitution is a compact between States. He wrote that:

We do some violence to the idea of contract when we regard an ordinary Constitution either as a compact of the citizens or a compact between the citizens and their government; but we need neither analogy nor metaphor to speak of the agreement of the parties in an union of States.⁹

Like the judges in the *Railway Servants Case* and *Cousins*, Moore concluded that "the contractual basis of the Constitution is an element to be considered in its construction".¹⁰

Finally, in 1917, the Privy Council lent some support to the view that the Constitution should be read as embodying a compact between the States:

Their Lordships are called on to interpret the legislative compact made between the Commonwealth and the States, and they have to determine on the language of the Statute what rights of legislation the federating Colonies declared to be reserved for themselves.¹¹

8.2 The logic of the federal compact

The "federal compact" may be seen as involving the Australian people, the people of the various States, or the various States as corporate entities. Although each view can find support in the literature, the first two views rely on insupportable moral arguments. Is the remaining view supportable?

8.2.1 Federalism as a bargain

The concept of compact is inherent in federalism. The root meaning of "*foedus*" is an *agreement* between parties.¹² Elazar's standard text defined federalism as:

some kind of contractual linkage of a presumably permanent character that (1) provides for power sharing, (2) cuts around the issue of sovereignty, and (3) supplements but does not seek to replace or diminish prior organic ties where they exist".¹³

8. *Railway Servant's Case* (1906) at 534; see also *Cousins* (1906) at 539 per Griffith for the Court.

9. Moore (1910) at 77-78.

10. Moore (1910) at 78, n 2, citing *Cousins* (1906) at 539, *Baxter* (1907) at 1109, 1113. But cf Lindell (1986) at 47:

The writer would be surprised if the characterisation of the Constitution as a "compact" will, on close examination, be found to be a principal and independent ground of any decision of the High Court.

11. *Royal Commission's Case* (1913) at 655 per Viscount Haldane, for the Privy Council. However, the Privy Council did not explain how the Commonwealth came to be a party to a contract concluded before it came into existence: see below [8.3.10].

12. Elazar (1987) at 5; Riker (1975) at 99.

Similarly, Davis thought that:

The federal constitution is essentially a political bargain, struck by political bargainers - the “Founding Fathers” - who assemble from a variety of motives to create some degree of permanent union between communities where previously there was none, or to create some degree of diversity where previously there was complete union.¹⁴

However, some federations are not contractual. When he defined federalism in structural terms, Wheare did not refer to contract. He defined a federation as a nation in which powers are divided so that “general and regional governments are each, within a sphere, coordinate and independent”.¹⁵ There was no agreement in India in 1948, Belgium in 1969 and Spain in 1975, when the leaders of unitary states decided to impose a federal structure believing that it was likely to maintain the unity of their respective countries. But such “holding together” federations *are* different from “coming together” federations such as the United States and Australia, where federation *was* the result of bargaining between constituent units.

8.2.2 State corporate personality

In those federations which did result from a political bargain, the notion of a federal compact depends on viewing each State as a corporate entity. And whereas it is senseless to talk about the compact of Australia because there is no-one for Australia to agree *with*,¹⁶ there is some sense in talking about an agreement between the States.

How is the act of a political community identified? Political community ultimately depends on both self-identification, and legal structures to constitute the polity. Without legal structures, it is usually not possible to identify an act as that of the political community. Although the legal structures which constitute a polity reflect the self-identification of subjects, they are also usually influenced by historical legal structures, ethnicity, religion, and language. Self-identification may be in tension with legal structures. But in the normal case, legal structures are at least a good first approximation to delineating the boundaries and acts of a political community.¹⁷

13. Elazar (1987) at 12. See also Riker (1975) at 113-114, although his assumption that federalism is invariably motivated by military and diplomatic defence or aggression is dubious.

14. Davis (1956) at 227.

15. Wheare (1946) at 11-15; similarly, see Watts (1966) at 10-14.

16. See above [8.1.2].

17. In this way the *moral* argument which depends on identifying a political community refers to *legal* structures. The legal delineation of a political community is relevant even when (as here) it is invoked to deduce a moral obligation which is not legally enforceable.

8.2.3 State corporate agreement to the Constitution

Each colony agreed to the Constitution as a political entity. In each colony, legislation provided that certain events would constitute the colony's approval of the draft Constitution. Legislation in each colony provided that the draft Constitution be submitted to the electors of the colony, designated the system for conducting the referendum, designated what would constitute an affirmative vote,¹⁸ and if the vote was affirmative, authorised the Parliament of the Colony to adopt an Address to the Queen praying for admission of the colony as an original State of the Commonwealth of Australia.¹⁹

The outcome of this elaborate legislative machinery, rather than the mere views of electors, constituted the acts of each colony with respect to the Constitution. The majority of voters in a colony was relevant to agreement only because of legislation of that colony which made it so. As the events in Western Australia almost showed, a Colony's Parliament could have chosen never to hold a referendum, and the Colony would legally and *de facto* have remained outside the federation. And as the unsuccessful referendum in New South Wales in 1898 illustrated, a majority of voters was irrelevant if the authorising legislation imposed a further requirement, such as a minimum number of affirmative votes.²⁰ Thus the agreement to the Constitution was that of the polities of the colonies, not merely some of their people.

But why is the agreement of a polity significant? Manifestly in some circumstances the decisions of a polity have moral and legal significance. States have legal personality, so that States or their governments own property, make contracts and commit torts.²¹ The whole point of federalism is to create at least two tiers of government with different legal personalities. This is recognised by a number of constitutional rules. For example, a State

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18. *Australasian Federation Enabling Act 1895 (NSW)*, s 35, as amended by *Federation Enabling Act Amendment Act 1897 (NSW)*, s 2 provided that affirmation of the Constitution by the polity of New South Wales required a majority of voters *and* an affirmative vote of at least 80,000 people. After a referendum passed by a majority failed to meet this threshold, legislation for a subsequent referendum imposed no such minimum requirement: *Australasian Federation Enabling Act 1899 (NSW)*, s 6. Victorian legislation required an affirmative vote of at least 50,000: *Australasian Federation Enabling Act 1896 (Vic)*, s 36.
19. *Australasian Federation Enabling Act 1895 (NSW)*; *Federation Enabling Act Amendment Act 1897 (NSW)*; *Australasian Federation Enabling Act 1899 (NSW)*; *Australasian Federation Enabling Act 1896 (Vic)*; *Australasian Federation Enabling Act 1899 (Vic)*; *Australasian Federation Enabling Act 1900 (WA)*; *Australasian Federation Enabling Act 1895 (SA)*; *Commonwealth Bill Amendment Act 1899 (SA)*; *Australasian Federation Enabling Act 1895 (Tas)*; *Australasian Federation Enabling Act 1899 (Tas)*; *Australasian Federation Enabling Act 1899 (Qld)*. See also [6.4.3] on the process leading to enactment of the Constitution.
20. See Quick & Garran (1901) at 213; *Australasian Federation Enabling Act 1895 (NSW)*, s 34.
21. see generally Hogg (1989b).

Attorney-General has standing to challenge Commonwealth action unauthorised by the Constitution, on the basis that the Attorney-General represents a State which is a distinct polity in the federation, entitled to a remedy if other polities in the federation do not adhere to the rules of that federation.²² As independent polities, States and Commonwealth may coordinate legislation to intermesh.²³ The reality of State government personality is reflected by the ongoing bargaining between constituent governments characteristic of intergovernmental relations in Australia, and indeed most federations.²⁴

But the existence of corporate personality for some purposes does not necessarily imply its existence for all purposes. As Hart pointed out, the true meaning of “corporate personality” depends on the circumstances, and is ultimately merely a short-hand for drawing a legal conclusion on the basis of a series of special rules which by their terms are applicable in that situation.²⁵ One should always ask why it is appropriate to apply a legal doctrine - such as the unity of a political community. Collective personality is relevant for moral analysis only if in the particular circumstances there is some moral advantage (ultimately for individuals) to thinking and acting in this way.²⁶ The language which applies to individuals may be convenient for describing the rights and responsibilities of corporate entities, but one cannot simply assume that anything which is legally or morally true for individuals is therefore legally or morally true for corporate entities. Rather, the applicability to a corporate entity of each norm must be established separately.²⁷

8.2.4 Legal significance of colonial compact

Thus the existence of the States’ corporate personality for some legal and moral purposes does not solve the question, either legally or morally, about whether we should view the Constitution as a compact between the corporate States. State corporate personality for some purposes does not entail that *every* act of a State has the same moral and legal implications as if it had been performed by an individual.

22. *AAP Case* (1975) at 381 per Gibbs J; similarly at 401 per Mason J.

23. *Ansett Transport* (1980) at 250; *Gould* (1998) at 484-485 per Kirby J.

24. Elazar (1987) at 184-186.

25. Hart (1983) at 21-48, particularly at 36-40.

26. Hart (1983) at 43.

27. For example, in *Caltex* (1993) the High Court examined a common law presumption that a statute does not require self-incrimination and held that the presumption applies to persons, but not to corporations.

The compact between the colonies was not, and is not, legally enforceable as a contract. The High Court has insisted that whilst the colonies could enter into ordinary contracts, they had no capacity to enter into a compact which dealt with their sovereignty:

[The US] Constitution, it must be remembered, resulted from, and expressed, a compact between independent and sovereign states for a union between them in which respect it was basically unlike our own Constitution, which is an Imperial statute albeit deriving from political and, through referenda, popular agreement in Australia, providing for the union of the people of the six colonies, then all under the Imperial Crown, in the Commonwealth. Though self-governing, the colonies were neither sovereign nor independent.²⁸

Clearly, as a matter of Imperial constitutional law the colonies were “neither sovereign nor independent”. But could they nevertheless make agreements legally delegating their authority?

The Australian colonies could not delegate their authority by a treaty recognised by international law. Before Federation, the Australian colonies lacked full international legal personality.²⁹ Some component units of federal states can make treaties recognised by international law.³⁰ However, like the pre-Federation colonies, the Australian States still lack this capacity.³¹ The Australian colonies could make agreements of “less than treaty status” which, although not enforceable at international law, were enforceable as a matter of domestic law.³² But whilst colonial agreements were sometimes enforceable in contract, an agreement delegating part of a colony’s authority was not. Whilst colonies could to some extent make agreements of a commercial or technical character, the power to make “political” agreements was reserved to Whitehall.³³

Agreements about authority would also have been unenforceable as a matter of domestic constitutional law. Imagine an agreement between the colony of New South Wales and the colony of Victoria to delegate their authority over weights and measures to another body. If the agreement were merely between executives, then in Victorian courts it would not have prevailed over inconsistent Victorian legislation. A contractual suit in the courts of New South Wales would have been successfully resisted by Victoria either because the compact

28. *Worthing* (1969) at 97 per Barwick CJ; and similarly at 125 per Windeyer J, quoted below text accompanying fn 58.

29. Senate Legal and Constitutional References Committee (1995) at 46-48. However Doeker (1966) at 212-213 notes that the colonies had, and the States retain, a *limited* competence with respect to international relations.

30. Di Marzo (1980) at 1-49; Bernier (1973) at 187-190; Senate Legal and Constitutional References Committee (1995) at 146, 148, 151, 153-154, 162.

31. Senate Legal and Constitutional References Committee (1995) at 46-48.

32. Senate Legal and Constitutional References Committee (1995) at 202-204.

was not intended to be legally enforceable, or because the courts would not enforce an executive promise concerning the exercise of legislative power,³⁴ or because the contract was not in the ordinary course of administration.³⁵ If the agreement were embodied in legislation of both Parliaments claiming priority over subsequent legislation, then the courts of both Victoria and New South Wales might have enforced the agreement despite subsequent inconsistent Victorian legislation.³⁶ However, they would not have enforced the contract *per se*, but the legislation of their respective parliaments. As a matter of domestic law, the *agreement* between the governments would have had negligible force.

Legally then, an agreement between the pre-Federation colonies, *qua* agreement, would have been unenforceable. It remains so. But the *legal* status of an agreement between the pre-Federation colonies is not the only relevant question. The fact that an agreement is not legally binding is sometimes relevant to whether one *should* act in accordance with that agreement. But it does not resolve that question. Even if there is no intention to create legal relations, a promise can still create moral obligations. Thus there remains to consider whether the agreement of the colonies provides either moral reasons to obey the Constitution, or a basis for preferring one (legally binding) interpretation rather than another. The colonies' lack of capacity to make a legally binding contract has limited relevance to, but does not resolve, the moral question. Correspondingly, the fact that the States now have the legal capacity to agree with the Commonwealth so as effectively to alter the Commonwealth Constitution³⁷ does not resolve the moral significance of the colonies' agreement.³⁸

33. O'Connell (1967) Vol I at 39.

34. *Rothmans* (1991); *Ansett Transport* (1977) at 74.

35. See Zines (1997a) at 257-258.

36. This raises difficult questions of the amorphous doctrine of parliamentary supremacy. Provided that the subsequent Victorian legislation did not manifest a sufficiently clear intention to override the original Act, it is possible that the original Act would be enforced. The courts of the United Kingdom have upheld legislative acts of European institutions over subsequent inconsistent UK legislation on the basis that the subsequent legislation did not expressly repeal the UK Act delegating authority to European institutions: *Factortame [No 2]* (1991) at 658-659 per Lord Bridge. Even if there were a manifest intention to override the original Act, the amending Act would be ineffective if it were not made "in such manner and form" as is required by the original Act: *Australia Act 1986 (Cth)*, s 6. However, it is not always obvious whether a previous provision is "substantive" - in which case it may be overridden by subsequent inconsistent legislation, - or one of "manner and form" - in which case subsequent legislation must comply with it: see Hanks (1996) at 133-142.

37. *Australia Act 1986 (UK)*, s 15(1): "This Act or the Statute of Westminster 1931 ... may be repealed or amended by an Act of the Parliament of the Commonwealth passed at the request or with the concurrence of the Parliaments of all the States". An amendment passed by the Commonwealth Parliament to the *Australia Act 1986 (UK)* would override an inconsistent provision in the Australian Constitution.

8.2.5 Moral significance of colonial compact

Instead we must ask whether there are good reasons to fulfil an agreement made by the colonial polities which had substantial powers of independent self-governance, but were not technically sovereign at international law. To put it another way, groups of people were politically organised as semi-autonomous communities a century ago, and those communities made an agreement with each other. Does a group of people today have any moral reason to respect that agreement because their political organisation is historically connected to one of the political organisations which made that agreement?

It is reasonable to assume that some goods are in practice only available if people are politically organised [10.2.1]; that the world's population is organised into a number of identifiable - and often overlapping - political communities; and that (other things being equal) there is some value in new arrangements being made according to the procedures of current arrangements [10.2.4].

Accepting these assumptions for the moment, what value can there be in different political communities cooperating? Changes in technology, particularly its effect on the environment, on techniques of warfare, and in facilitating international trade, commerce and intercourse, have continuously expanded the class of matters where cooperation between polities yields substantial benefits. These changes have been reflected by an explosion in the volume of international law making in the twentieth century.

However, there are inevitable costs to integration, including the loss of political autonomy of the component communities.³⁹ It may be desirable to preserve community autonomy for a number of reasons. Firstly, separate tiers of government may control each other and prevent the abuse of official power against individuals. This is Madison's classic argument for federal structures.⁴⁰

Secondly, less integration may increase the satisfaction of choices because it:

- increases the number of people who will be satisfied, because integrated minorities are local majorities;
- allows voters to vote for more specific policies because different levels of government are responsible for different policy areas;

38. Cf Lindell (1986) at 49 who suggests that the capacity to make a legally binding agreement under *Australia Act (UK)*, s 15(1) may fortify viewing the Constitution as a compact.

39. *Capital Duplicators [No 2]* at 613 per Dawson J (dissenting).

- allows voters to choose preferred policies by migrating;
- presses governments towards desired policies with the threat of labour and capital emigration (competitive federalism theory);
- involves fewer interest groups, and therefore minimises the possibility of creating a winning coalition that does not reflect the interests of one group; and
- promotes direct access to politicians and thus reduces the cost of influencing their behaviour.⁴¹

Thus less integration may be desirable to the extent that satisfying choices is valuable. Voter choices may be valuable because they are a better approximation to the common good than the wishes of those in power, or because satisfying voter choices is an end in itself [4.5]. However, if some people (in particular, businesses and the wealthy) are more mobile than others, then government policies may be unjustly skewed towards the interests of these groups.

Thirdly, less integration may be desirable because it leads to greater policy experimentation, and ultimately better government.⁴²

The movement for Australian Federation claimed that the costs of integration were outweighed by the need for cooperation between the Australian colonies. At the time, the objectives of Federation included that the colonies should have no internal tariffs and should have a common policy and provision for defence, immigration, trade, and various other matters - all of which required a common political structure.⁴³ Some also saw Federation as desirable so that formal political structures would reflect their personal identity as “Australians”.⁴⁴

Unless one resorts to war, consent is necessary to create an institutionalised scheme of cooperation between communities concerning matters for which they have previously enjoyed autonomy. But the trade-offs between integration and autonomy are almost inevitably contentious. Seldom will there be unanimous and spontaneous agreement that total integration is desirable. If those committing their communities to an agreement for

40. *The Federalist Papers* (1788), No 51.

41. Prichard & Benedickson (1983) at 17-18.

42. Bryce (1893) Vol 1 at 353; *New State Ice Co* (1932) at 311 per Brandeis J.

43. See Dawson (1992) at 4-7. However, it is notoriously difficult to pin down which influences were crucial even in the actual referendum votes: see the articles by Parker, Blainey, Bastin and Martin reprinted in Eastwood & Smith (1964) at 152-225; Hewett (1969) at 183.

integration thought that the terms of the agreement would not be adhered to, but instead would become a means to coerce consent to a new but undesired community, it is unlikely that they would agree. A practice of adherence to the conditions of *yesterday's* agreement is an important means to instil the confidence necessary to make *today's* agreement.

Thus the institution of political promising provides an acceptable means to achieve the ends of closer integration. To the extent that closer integration is in fact desirable, the institution of making - *and keeping* - political promises is important. The value of cooperation between States provides at least some reason to respect, even today, the agreements made between their colonial predecessors, unless it is agreed to alter them according to processes previously agreed upon. The value of promise-keeping subsists even though the agreements were not made by people of today. People today can only realise the advantages of institutional organisation and cooperation by identifying themselves with the institutions they have inherited.

Events in Northern Ireland provide a contemporary illustration of how keeping past promises is important to future welfare. The most powerful argument against accepting the 1998 peace agreement was that some parties had failed to honour previous promises, particularly those concerning the surrender of weapons by paramilitary organisations. The failure to keep past promises suggested that the benefits promised by the 1998 agreement would never materialise, whilst the autonomy surrendered by the agreement would be irretrievable. The failure to keep past promises affected preparedness to engage in subsequent, potentially desirable, cooperation.

There are costs to this institutional loyalty. It reduces one's autonomy today. The agreements may have been undesirable when made. Even if good then, the passage of time may have made the agreements inappropriate. Nevertheless, the existence of an historic agreement provides a significant moral reason for action, which should be considered.

8.2.6 Continuity of community

The moral reasons for respecting an historic agreement depend on perceiving today's community as somehow "identical" to yesterday's community. This kind of reasoning relies on metaphor and abstraction - but it is a metaphor essential to our capacity to understand the world. The cells which composed "me" yesterday are different from the cells which compose "me" today, but "I" am the same. Unless we are prepared to perceive the world in this way, it

44. Blainey (1964) at 192.

is difficult to make sense of it.⁴⁵ Similarly, it is difficult to make sense of politics unless we are prepared to see yesterday's political community of "Australia" as the same as today's political community of "Australia", even though the members of that community have changed. And similarly, there is at least some reason for Victorians of today to see themselves as part of the same political community that agreed to federate, and to honour the promises of the colony of Victoria.

Are the States the same political communities as the colonies? The identification of a political community depends on both self-identification, and legal structures which constitute the community and its acts [8.2.2]. So one means to determine whether a State is the same political community as its colony is to ask whether the Australian constitutional framework considers the States to be legally identical to the colonies. The polity of Victoria, for example, was defined by Imperial Act.⁴⁶ The authority of this source as the definition of the polity was continued, not extinguished, by s.106 of the Constitution.⁴⁷

However, some have suggested that legally the States are "creations of the Constitution" because they derive their authority from s.106 of the Commonwealth Constitution rather than the original Imperial Acts.⁴⁸ There are difficulties with this theory. First, the terms of s.106 do not purport to confer authority on the State Constitutions. Instead s 106 provides that:

The Constitution of each State⁴⁹ of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth

Second, if the Commonwealth Constitution were repealed (as the Imperial Parliament had power to do at least until 1985 [5.4]), there is no doubt that the State Constitutions would remain legally valid.

But even if State Constitutions do now derive their authority from s.106 of the Constitution, that section expressly *links* the colonies with the new States as political communities by providing that "the Constitution of each State ... shall, subject to this

45. On problems of identity, see [4.4.5], particularly at fn 67

46. 13 & 14 Vic, c.59 (an Act for the better Government of Her Majesty's Australian Colonies); 18 & 19 Vic, c 55, s 1 (an Act to enable Her Majesty to assent to a Bill, as amended, of the Legislature of Victoria, to establish a Constitution in and for the Colony of Victoria).

47. *China Ocean* (1979) at 182 per Barwick CJ; *Wilsmore* (1981) at 181-183 per Burt CJ for the Court.

48. *Residential Tenancies Tribunal* (1997) at 561 per Kirby J; see also *Theophanous* (1994) at 164 per Deane J; Zines (1997a) at 341.

49. A "State" is defined to mean the pre-existing colony: see *Commonwealth of Australia Constitution Act (UK) 1900*, s 6.

Constitution, continue”. Whatever view one takes of the effect of s 106, the States are the same political communities as the colonies they replaced.

8.2.7 Conclusion

Thus neither the “compact of the People” nor the “compact of the people of the colonies” provide legal or moral reasons for action. But the Constitution can be seen as embodying an agreement between the polities of the constituent States. This agreement is not legally binding *qua* agreement. There are, however, good moral reasons to respect the agreement, provided that today’s States are seen to share an identity with the pre-Federation colonies. This identity may be perceived both in the continued self-identification of people as, say, “Victorians”, and in the continuity of the colonial constitutions.

The notion of a “federal compact” has been applied in the United States and in Canada. In 1838 the United States Senate adopted a resolution by a majority of 31 to 13 that the US Constitution was (and presumably remained) a compact of sovereign states.⁵⁰ This approach was advocated particularly on behalf of the Southern States prior to the civil war.⁵¹ But the compact theory was opposed by nationalist claims that the Constitution’s legitimacy was derived directly from the people. Since the 1861-1865 civil war, this latter nationalist view has been in the ascendant in the United States.⁵²

For those debating the Canadian Constitution in 1857-1867, the Canadian Constitution embodied a federal compact, and this had significant moral consequences.⁵³ The notion was still accepted in 1930.⁵⁴ Perhaps the high point of the theory was Lord Sankey’s speech in the *Aeronautics Case*:

Inasmuch as the [British North America] Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions [assigning legislative power] should impose a new and different contract upon the federating bodies.

But while the Courts should be jealous in upholding the charter of the Provinces as enacted in [the provisions granting legislative power to the Provinces] it must no less be borne in mind that the real object of the Act was to give the central Government those high functions and

50. Corwin (1925) at 294-295.

51. Bennett (1964) at 132-136, 164-169.

52. Thomson (1985) at 1203, n 32.

53. Stanley (1969) at 94-96.

54. Stanley (1969) at 96-98.

almost sovereign powers by which uniformity of legislation might be secured on all questions which were of common concern to all the Provinces as members of a constituent whole.⁵⁵

However, in the 1930s those who desired a more powerful central government in Canada repudiated the compact theory conceptually, and argued that historically it had never been truly accepted. It is no longer a significant concept in Canadian constitutional theory.⁵⁶

Should Australia do the same?

8.3 The case against a compact

The conclusion that the Constitutional compact has moral force may be attacked in various ways.

8.3.1 Legal form

The first argument is that the Constitution is not in the form of an agreement between the States.⁵⁷ Rather, it is an Act of the Imperial Parliament. As Windeyer J wrote:

The Constitution of the United States [is] in origin the outcome of agreement by peoples who were not then all subject to any one political tie. The colonies had all thrown off their allegiance to Britain. The Australian Constitution, on the other hand, gets its juristic force not as a compact, but from a statute of the Imperial Parliament.⁵⁸

The Constitution's *legal* authority is indeed derived from its enactment by the Imperial Parliament.⁵⁹ *Qua* agreement, the agreement between the States is not legally binding. But as suggested above,⁶⁰ this is not the end of the matter. Even if the agreement is not legally enforceable as such, the fact of agreement may still provide moral reasons for obeying the Constitution, and influence legal interpretation. Whereas the Constitution's *legal* form is an Imperial Act of Parliament, as a matter of history that Act implements the agreement of a

55. *Aeronautics Case* (1931) at 70-71 per Lord Sankey for the Privy Council.

56. Stanley (1969) at xiii-ix, 154-155.

57. See the quotation above, text accompanying fn 28, from *Worthing* (1969) at 97 per Barwick CJ. Similarly, see *Damjanovic v Commonwealth* (1968) at 407 per Windeyer J; *Payroll Tax Case* (1971) at 370 per Barwick CJ, at 395 per Windeyer J; Latham (1961) at 5; Craven (1986a) at 78-80; Mason (1986) at 25; and Thomson (1985) at 1201.

58. *Worthing* (1969) at 125 per Windeyer J. The comparison with the United States Constitution is problematic. Only since the Civil War has approval by the previously sovereign States been regarded as unimportant [8.2.7]. But even at the time of Union, the validity of the United States Constitution was regarded as derived from approval by representatives of the whole American people, elected according to the boundaries of the pre-Union States. This was a deliberate choice of theory. Deriving authority from the people rather than the authority of the pre-Union States was considered to justify obedience to the US Constitution even though its approval contravened the constitutions then in force for some of the American colonies [6.4.2].

59. See Chapter 5.

60. Text accompanying fn 37-38.

number of semi-autonomous political communities. The legal form of the Constitution is simply not determinative of the moral argument

8.3.2 Agreement of people not States

Goldring argued that it is difficult to interpret the Constitution as a compact because the delegates to the final Convention were directly elected, and the text was approved by referendum.⁶¹ However, even if a polity involves its people directly in reaching a decision, the decision may still be made by the polity, as well as by its electors. Delegates were elected to the Constitutional Conventions as representatives of particular colonies; referenda were held within each colony pursuant to colonial legislation; and people voted as electors of their particular colony. The decision to federate was made by each colony as a polity - i.e. in accordance with the legal and political rules which themselves defined the polity and its acts. From a practical point of view, the options either to abstain or to participate in Federation, were possessed by each colony as a political entity, not merely by a “majority” of their people [8.2.3]. Thus the popular referenda are no obstacle to seeing the Constitution as an agreement between the polities of the States.

8.3.3 No intention to contract

Lindell denied that the Constitution can be viewed as a compact because there was no intention at the time to treat the Constitution as a compact between the Commonwealth and the States.⁶² It is true that the *form* of the Constitution is an Act, and there was no intention to treat the agreement as a *legally* binding contract [8.3.1]. However, there was every intention to treat the Constitution as embodying an agreed set of promises. In 1901 no-one thought, for example, that one State had any *moral* right to renege unilaterally on the deal.

This approach, treating the Constitution as embodying a set of promises, was adopted by the High Court in *Cousins* (1906). Section 84 of the Constitution provides that State public servants who at Federation became part of the Commonwealth public service, preserve their existing and accruing rights under State law. *After* the referenda approving the Constitution had been passed, but *before* the Constitution came into effect, Victoria passed a law raising the salary of those public servants working in departments which were to be transferred to the Commonwealth. The Court held that the Commonwealth was constitutionally permitted to reduce the salaries of Victorian public servants after they had become part of the Commonwealth service. Writing for the Court, Griffith CJ said that the

61. Goldring (1997) at 26.

Constitution was the result of a compact between the several Australian States. When that compact was agreed, its parties must have known about the existing terms of public service employment. They would not have envisaged a change just before the agreement took effect which created “an entirely new right to be imposed upon the other parties to the compact without their consent”.⁶³ Presumably, the underlying premise was that whereas an ordinary Act of Parliament would be read according to its terms, a contract should be read subject to an implication that a party cannot unilaterally determine the essential terms of the contract.⁶⁴ Hence the Commonwealth was free to reduce the salaries of those previously in the Victorian public service.⁶⁵

The judges in *Cousins* had all been delegates at various of the Constitutional Conventions. They, at least, were prepared to see the Constitution as embodying an agreement which was morally binding, and considered this agreement to have some legal consequences.

8.3.4 Intertemporal problems

Stokes argued that the passage of time detracts from the force of agreement because the agreement of a previous generation cannot bind people today.⁶⁶ The views of a previous generation *qua* people are indeed irrelevant today [6.3.2]. However, the agreement of a political *community* focuses on the official acts of the community, and allows that a “community” may subsist even as its members are born and die [8.2.6]. The passage of time, and the change in individuals who compose various polities, do not nullify the moral force of an agreement between polities.

8.3.5 Contingency

However, perhaps the agreement was merely contingent. Davis argued that the Constitution is only an imperfect reflection of the parties’ wishes at a particular point in time:

“at best the federal compact can only be a formalised transaction of a moment in the history of a particular community”⁶⁷

62. Lindell (1986) at 49.

63. *Cousins* (1906) at 539

64. Else the contract would be void for uncertainty as there would be no agreement *ad idem*: see *Godecke* (1973) at 647 per Gibbs J; *Meehan* (1982) at 587-589 per Mason J.

65. As a separate ground of decision, the Court also held that, by contrast with statutes setting judicial salaries, the Victorian statute did not confer an irreducible salary.

66. Stokes (1994) at 266.

67. Davis (1956) at 242.

His argument seems to be that the events of a particular moment in history cannot be the basis for continued obligations. But every bargain is made at one point in time. If Davis' argument were valid there would be no reason to respect *any* promise or contract. The very purpose of the institution of promising is to enable a decision made yesterday to influence tomorrow, and so to provide a basis for planning today. There is no paradox if an event at one point in time is treated as having a continuing influence.

8.3.6 Constitution also binds those who didn't agree

The compact of the States is attacked, like the agreement of the people, because it cannot explain why those who dissent are bound by the agreement.⁶⁸ Again the answer depends on recognising that the parties to the federal compact are political communities, not individuals. Only those polities which agreed to the federal compact are its members. There was no question in 1900, but if Western Australia had *not* legislated and voted for Federation, then Western Australia - and its constituent people - would not have been included as part of Australia. New Zealand, despite participation in the early negotiations, did not legislate for Federation, and it consequently remained a wholly distinct colony which ultimately became an independent country.

8.3.7 Constitution changes meaning

Stokes also argued that it is inappropriate to view the Constitution as a compact because its meaning has changed over time, and ought to have done so.⁶⁹ However, *legitimate* shifts in constitutional interpretation are restricted. Legitimate shifts in constitutional interpretation do not differ substantially from legitimate changes in the interpretation of a contract which is envisaged at its outset to remain in force for a long time.⁷⁰

8.3.8 Territories

The Constitution's embodiment of a compact between the States provides no reason for the people of the Territories to obey the Constitution. The Territories are not "members of the club". Their political communities (more inchoate in 1901 than those of the States) did

68. Stokes (1994) at 266-267.

69. Stokes (1994) at 267.

70. On the interpretation of old contracts, see Lewison (1997) at 114-116; and of the judicial approach to the interpretation of old statutes discussed in Bennion (1997) at 687-701. The interpretation of old Constitutions is discussed by Goldsworthy (1997b).

not agree to the compact, and their interests are correspondingly less guarded by the Constitution.⁷¹

Some of the Australian territories are small geographically isolated communities which are part of Australia either by cession from the United Kingdom, or by international agreement. Their residents are obliged to obey the Constitution, and law which flows from it, only because of the advantages of constitutionalism, and not because of any argument flowing from the value of respecting past agreements made by one's political community with other political communities.

The Northern Territory and the Australian Capital Territory raise more complex issues. Authority over the Northern Territory was surrendered by South Australia to the Commonwealth in 1911.⁷² It might be argued that the political community of the Northern Territory is derived from that of South Australia and hence the Territory is bound by South Australia's agreement. Is the Northern Territory bound because it is an offshoot *derived* from the contracting Province of South Australian, albeit not *identified* with South Australia?

It is fundamental to contract, and to the moral institution of promising, that an agreement only binds those who made it.⁷³ The argument for respecting the federal compact depends on perceiving a continuity of identity between a State today, and a colony in 1900 [8.2.6]. However, the new political community of the Northern Territory is not "identical" to the preceding Province and State of South Australia. The disjunction is particularly stark because South Australia continues to exist, independent of the Northern Territory. Consequently, the Northern Territory is not a party to the agreement to federate.

71. Compare the relative rights of States and Territories, including the States' rights to representation (cf ss 7, 24 and s 122); to immunity from all but specified Commonwealth legislative power (cf s 51 and s 122); to compensation for acquired property (s 51(31) - the distinction in s 51(31) between the rights of States and the rights of Territories remains despite the decision that s 51(31) gives *persons* a right to compensation for the Commonwealth's acquisition of property within a Territory: see *Newcrest* (1997) at 102 per Gummow J); to share in excess revenue (s 89); to free trade with each other (s 92); to reasonable use of river waters (s 100); to veto boundary changes (s 123); to veto in combination Constitutional alteration (s 128); and to immunity from Commonwealth taxation on property (s 114). Correspondingly, unlike Territories, States are subject to Constitutional liabilities and disabilities: inability to restrict trade from other States (s 92); inability to raise naval or military forces (s 114); inability to tax Commonwealth property (s 114); inability to coin money or create legal tender (s 115); and liability to house Commonwealth prisoners (s 120). However, *Capital Duplicators [No 1]* (1992) decided that the Commonwealth could not confer power on the legislature of a Territory to impose excise duties. This decision may entail that delegated Territory legislatures are subject to all the same Constitutional disabilities as State legislatures.

72. *Northern Territory Surrender Act 1907 (SA)*, pursuant to *Commonwealth Constitution*, s 111.

73. An entity created by an agreement may be bound by the agreement, but this is a special case: see below [8.3.10].

Can anything be made of the constitutional amendment in 1977⁷⁴ which conferred the right on people of the Territories to vote in subsequent referenda? Mason J wrote that:

Whether the representation of a Territory by a voting member in a House of the Parliament is consistent with the Federal compact depends upon the terms of the Federal compact as it is expressed in the Constitution. But in so far as the [contrary] case may be thought to draw independent support from considerations deriving from the Federal compact, it is to be noted that ... the Constitution was amended ... so as to accord people in the Territories a role in referenda.⁷⁵

What does this passage mean? It appears to suggest that acquiring the right to vote in referenda somehow made the people of the Territories, or the Territories themselves, parties to the federal compact. However, there is an insurmountable difficulty. The alteration of the Constitution does not in itself make the Territories a “party” to the compact; only their *agreement* could have that effect. Alternatively, perhaps Mason J saw the “Federal compact” as the ongoing process of federal government involving the States through their federal Parliamentary representatives. No doubt the Territories were further inducted into that process when they became part of the process for Constitutional amendment. But this analysis never grapples with the concept of the Constitution as the embodiment of a real, rather than merely fictional, agreement. Any moral obligation stems from the fact of real agreement, not merely from the terms of the agreement and the ongoing process of federal government which it authorises. Allowing people of the Territories to vote in referenda did not make their political communities party to the actual federal compact.

It is not surprising that the Northern Territory is not bound by the federal compact *qua* compact. The conclusion accords with the general principle of international law that a new state created by partition does *not* inherit the treaty liabilities of the state from which it separated.⁷⁶ The conclusion does not imply that the people of the Territories have *no* moral obligation to obey the Constitution. Obligations may exist because of the Constitution’s role in settling the location of authority, or for any of the other reasons discussed in other chapters. The exclusion of the Territories from the federal compact merely implies that a reason which may apply to people of the States has no application to the people of the Territories.

74. amending s 128.

75. *Second Territory Senators* (1977) at 607 per Mason J.

76. Brownlie (1998) at 663-667.

8.3.9 New States

The Constitution provides that new States may be created by the Commonwealth Parliament.⁷⁷ Where the new State consists of an area separated from existing States, or the union of all or part of two existing States, the States affected must also consent.⁷⁸ The original parties to the compact have no especial rights to control the creation of new States. Can a new State be a “party” to the federal compact?

There is no conceptual requirement that the original parties to a contract expressly approve each new additional party to the contract. The original parties can provide, in their original agreement, that any entity which submits to a process described in the original agreement shall become a party with a status similar to that of the original parties.⁷⁹ This process may well not involve the original parties. The rules of an unincorporated association are one example of such a contract; another example is the Constitution, with its provisions for admitting new States.

However, the Constitutional process does not ensure the agreement of the new State to the federal compact. Whereas the predecessors of the original States expressly agreed to the federal compact, both through their parliaments and through the pre-Federation referenda, there is no constitutional requirement that a new State agree in a similar way. Without such an agreement, there is no political promise which might generate reasons for subsequent action. It is claimed that many of the United States had no thought of the federal compact when they submitted to the US Constitution after its original adoption.⁸⁰ However, it is *possible* for a new State to agree to the federal compact. When statehood was proposed for the Northern Territory in 1998, the change in status was conditional upon the consent of the legislature of the Northern Territory and a successful referendum of the people of the Northern Territory. The referendum in 1998 was unsuccessful. However, if it had been successful, approval by the polity would have constituted agreement to the federal compact. By explicitly agreeing to become a State under the Constitution, the polity of the Northern Territory would have accepted the burdens as well as the benefits of that agreement.

77. Section 121. It is envisaged that the Northern Territory may become a State pursuant to these provisions.

78. Section 124.

79. The status need not be identical: Under ss 7 and 24, Original States, but not new States, are entitled to equal representation in the Senate, a minimum number of Senators, and a minimum number of Members of the House of Representatives.

80. Powell (1925) at 307.

8.3.10 Commonwealth is not party to the compact

The most difficult obstacle for the federal compact theory is that the compact does not merely define the relationship of the States *inter se*, but also the relationship between the States and the Commonwealth. How can the federal compact bind the Commonwealth when the Commonwealth never “agreed” to it?⁸¹ Normally an entity is only bound by a contract to which it agreed. Is the federal compact a special case? This conceptual problem was not fully appreciated at the time of Federation. Most of the Founders concerns were of a Commonwealth dominated by the large States, rather than of a self-reliant Commonwealth affecting the independence of all States, large and small. As Craven put it, the States were like Frankenstein, who did not imagine that their creation would have its own personality.⁸²

A preliminary argument may assert that the Commonwealth *is* a party to the federal compact because a majority of those electors voting in the area which was to become the Commonwealth, voted for Federation. For example, Kirby J suggested that a provision of the Constitution was “a promise given on behalf of the Commonwealth at Federation”.⁸³ However, the referenda before Federation did not purport to be the acts of the Commonwealth polity. Rather they purported to be the votes of the polities of the various colonies [8.2.2, 8.2.3].

Can an agreement ever bind an entity which is not party to it? Imagine a merger between the Armadale Tennis Club and the Toorak Tennis Club. An agreement between the two clubs creates a unified administration in the new Leafy Tennis Club, vests in the Leafy Club all the assets of the Armadale and Toorak Clubs, and requires the Leafy Club to maintain in perpetuity the existing tennis courts, in both Armadale and Toorak. Several years pass. Most of the current members of the Leafy Club have joined since the merger. A newly elected committee proposes to sell the old Armadale courts because very few of the current members live in the area. Does the covenant in the old agreement impose any moral obligation upon them?

The Leafy Club’s very claim to existence rests, at least in part, on treating the Armadale-Toorak agreement as authoritative. Governance of the Leafy Club would be impossible if members were free at all times to go behind that agreement to ask whether the merger should have occurred, and then to purport to act on behalf of the Toorak Tennis Club.

81. The only author who appears to have identified this problem is Latham (1961) at 4.

82. Craven (1992d) at 61.

83. *Newcrest* (1997) at 150-151 per Kirby J.

If there is sufficient reason to treat *some* of a source's commands as authoritative, then there must be sufficient reason to treat *all* of the source's commands as authoritative. The point of authority is to identify norms by their source, independently of their content [3.2.1, 3.3.3].⁸⁴

If there is a good reason to treat as authoritative the agreement's conferral of power on the Leafy Club, there must also be some reason to treat as authoritative the other parts of the agreement. Thus because the Leafy Club's very claim to act at all depends upon the agreement, the Leafy Club has some reason to adhere to *all* of the agreement.

By analogy, to the extent that the Commonwealth derives its power from an agreement, it cannot deny the moral force of that agreement. As the Privy Council said in relation to the Ceylonese Constitution:

A legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law. This restriction exists independently of the question whether the legislature is sovereign ... The proposition which is not acceptable is that a legislature, once established, has some inherent power derived from the mere fact of its establishment to make a valid law by the resolution of a bare majority.⁸⁵

However, what if the new body's moral authority is also derived from some source other than the agreement? Perhaps the Leafy Club is now a legally registered corporation, whilst by contrast the Toorak and Armadale Clubs have been deregistered. Similarly, the Commonwealth's moral authority is derived from the Imperial statute enacting the Constitution⁸⁶ as well as from the federal compact. The Commonwealth's obligation to obey the compact only extends so far as its moral authority depends upon the compact. If others have *sufficient* reason to obey Commonwealth directives irrespective of the compact, then the Commonwealth is not bound by moral obligations arising from the compact.

By contrast, the obligations on States are cumulative. The obligation on a State derived from arguments of constitutionalism is independent of the obligation on a State derived from the Constitution's embodiment of an agreement. Each of these obligations may contradict or add to the force of the other. By contrast, the obligations on the Commonwealth are alternative. The obligation on the Commonwealth derived from the Constitution's status as an agreement exists only to the extent that the Constitution's status as an Act does not provide the Commonwealth with sufficient moral authority to act under the Constitution.

84. Of course, authoritative directives may coherently be treated as merely *prima facie* rather than conclusive reasons for action: see [3.2.2-3.2.3].

85. *Bribery Commissioner* (1965) at 197-198.

86. There are good *moral* reasons to fulfil the *legal* obligation imposed by an Imperial Act: see Chapter 10.

There are other arguments for considering the Commonwealth morally bound by the federal compact, even though it is not a party. It might be argued that because the Commonwealth accepted the benefits (of its own existence) from the Constitution, the Commonwealth is then morally obliged also to accept the burdens imposed by the Constitution. Hart claimed that political obligation generally arises in such situations.⁸⁷

The benefit/burden argument assumes that the benefits and burdens must be seen as part of an inseparable “package”, from which it would be morally wrong to pick out the cherries. The imperative to link benefits and burdens is most obvious if one could not obtain such a benefit unless someone incurred the associated burden. The Commonwealth could not have obtained the benefits (of existence) under the Constitution without the States surrendering their sovereignty. They would not have done so unless other burdens (i.e. limits on Commonwealth power) had also been imposed.

The closest legal analogy is the law of restitution. A recipient may be bound to “play fair” and share in the corresponding burden, even if he or she did not request the benefit conferred.⁸⁸ However, the analogy with restitution does not carry us far. Restitutionary obligations depend on both the behaviour of the benefactor and the attitude of the recipient. The moral obligation is weaker if the benefactor acted “officiously”, but stronger if the benefactor acted mistakenly and not negligently. The moral obligation is also weaker if the recipient could not reject the benefits and did not want them, but stronger if the recipient valued the benefits and would have tried to obtain them anyway.⁸⁹ On this analysis, the Commonwealth’s restitutionary obligation is weak: those who bestowed powers on the Commonwealth were not mistaken; and the Commonwealth had little practical choice but to act in accordance with its status as created by the Constitution.

In some respects, the benefit/burden argument is also an appeal to the principle that resources should be shared equitably between persons. This analysis treats the freely negotiated agreement of the Constitution simply as good evidence of what is fair.⁹⁰ The compact may be an imperfect guide to fairness, but it is likely to be a good approximation given that the parties negotiated freely and from relatively equal bargaining positions. However, whilst fairness is readily applicable to the distribution of resources between

87. Hart (1984) at 85-86.

88. Goff & Jones (1993) at 18-27.

89. Soper (1987) at 139-140.

90. Atiyah (1986) at 25-28, 329-354.

individuals, it is less obviously applicable to the distribution of powers between governments. There is no moral presumption that powers should be “fairly” shared between levels of government. Thus the benefit/burden argument is not convincing when applied to the Constitution.

It might also be argued that the Commonwealth has an obligation not to interfere with the compact made between the States. However, although a third party may be obliged not to induce others to break their promises,⁹¹ a third party is not usually obliged to perform acts merely because others have agreed upon them. The federal compact purports to impose upon the Commonwealth an obligation not merely of non-interference, but of active participation.

Thus the Commonwealth has at best a weak moral obligation to comply with the federal compact. The only sustainable argument is that because the Commonwealth’s moral authority is to some extent derived from the Constitution’s status as a compact, then to that extent the Commonwealth has good reason to obey the compact. The weakness of the Commonwealth’s obligation is a consequence of the Commonwealth deriving its moral authority from sources other than the mere fact of an agreement between the States.

8.4 Judicial hostility

Many High Court judges have been hostile to viewing the Constitution as a compact between the States. This hostility may simply result from a belief that it is illogical to draw moral or legal implications from the fact of agreement. However, there is at least a suggestion that some judges disliked the interpretational consequences.

8.4.1 Motives for hostility

An exhaustive analysis of the interpretational consequences of viewing the Constitution as embodying a compact, rather than as a Constitution with no such contractual background of agreement, is beyond the scope of this thesis. In brief summary, by contrast to principles of constitutional interpretation, principles of contractual interpretation:

- downplay the interests of those not party to the compact, particularly the Territories and individuals;
- emphasise the *actual* historical intent of the parties;⁹²

91. See Fleming (1998) at 756-765.

92. Rule of law considerations emphasise that interpretation of a Constitution should be guided by publicly available information: Goldsworthy (1997b) at 10; Allan (1985) at 117-118, 122-124. By contrast, contractual interpretation ultimately attempts to discover the *actual* will of the parties, as the doctrine of rectification illustrates: Carter & Harland (1996) at 448-454.

- are less likely to accept that the Constitution applies to new phenomena;⁹³
- assume that the States have coordinate status with the Commonwealth, and hence provides a basis for the federal implications of the *Melbourne Corporations* doctrine;⁹⁴
- repudiate the assumption that grants of power to the Commonwealth should be construed with all the plenitude which the words admit.⁹⁵

Historically many of these approaches to interpretation have been applied to the Commonwealth Constitution, and have been justified by reference to its status as a compact. However, their influence has waned in recent years. Those interpretational consequences which are still important are increasingly defended on bases other than the Constitution's status as a compact.

The increased reluctance to interpret the Constitution by reference to its status as a compact has generally expanded Commonwealth power at the expense of State power. Interpretations not based on the Constitution's status as a compact generally do less to constrain the value judgments of interpreters. The scope for judges to impose their own values on Constitutional outcomes is increased if one tolerates presumed rather than actual intent, and a lesser degree of similarity between the Constitution's original applications and its application today. By and large the High Court judiciary have preferred more centralised power than the Founders did. As a result, today's settled interpretations of the Constitution provide the Commonwealth legislature and executive with much greater power than the Founders envisaged.⁹⁶ These results might not have ensued if the notion of a federal compact

93. On the interpretation of old contracts, see Lewison (1997) at 114-116; cf the judicial approach to interpretation of old statutes discussed in Bennion (1997) at 687-701.

94. This implication from the Constitution, not based on any particular text, prevents the Commonwealth from passing legislation which would treat the States differently from ordinary individuals, and prevents the Commonwealth from impairing essential State functions. *Melbourne Corporation* (1947) at 99 per Williams J (concurring) notes that the doctrine is based on the idea that the Constitution embodies a compact. Williams J drew the same "necessary implication arising from the nature of the Federal compact" in *Uther* (1947) at 539. Similarly, see *QEC* (1985) at 218 per Mason J; *Australian Capital Television* (1992) at 210 per Gaudron J noting that not every consequence of the federal compact is spelt out, and that instead the "very notion of federalism" implies the *Melbourne Corporations* doctrine.

95. The usual claim is that grants of power to the Commonwealth in the Constitution should be "construed with all the generality which the words used admit": *Australian National Airways* (1964) at 225 *per curiam*, citing *Jumbunna* (1908) at 367-368 per O'Connor J. By contrast, there is no presumption about how a contract divides powers between the parties: indeed, it will be construed so as to *avoid* the result that one party has unilateral power to determine essential terms of the contract: see fn 64 above.

96. Stokes (1994) at 266; Craven (1990) at 176. This analysis disregards explicit amendments conferring power on the Commonwealth.

had remained a significant influence on constitutional interpretation. It is possible that the judicial preference for greater centralism itself motivated the increasing reluctance to view the Constitution as a compact.

8.4.2 Manifestations of hostility

Whether motivated by logic, or by a dislike of the substantive consequences for constitutional law, the influence of the federal compact theory on Australian Constitutional interpretation is now minimal. Some judges simply argued that the Constitution's legal force came from an Act of Parliament. They simply passed over the argument that the Constitution's *moral* force may spring from its embodiment of an agreement [8.3.1]. Others ignored the agreement between the colonies as political entities and concentrated merely on the agreement among "the people" [8.1.1]. As another alternative, Windeyer J redefined the notion purely as a description. He acknowledged the federal "compact" - in the sense of a "packing-together" of the pre-Federation colonies, whilst resisting the implications of the *agreement* of those colonies. As he wrote in the *Payroll Tax Case*:

As an agreement of peoples, British subjects in British Colonies, and the enactment thereafter by the sovereign legislature of the British Empire of a law to give effect to their wishes, the Australian federation can be described as springing from an agreement or compact. But agreement became merged in law. The word "compact" is still appropriate but strictly only if used in a different sense not as meaning a pact between independent parties, but as describing a compaction, a putting of separate things firmly together by force of law.⁹⁷

8.5 Conclusion

The federal compact is not legally binding as an agreement. At best, it is a weak argument that there is a moral obligation to obey the Constitution because it embodies a historical agreement between the States. The argument rests solely on the value of respecting past promises between polities so as to promote future agreements. These are relatively rare events. The argument depends on seeing today's States as sharing an identity with pre-Federation colonies. It is inapplicable to the Territories. The argument applies only in so far as the Commonwealth's moral authority is not derived from other sources. And as with many sources of moral obligation, the federal compact is defeasible if its results are worse than those which would follow from abandoning it. Not surprisingly, the theory and its interpretational consequences are now all but defunct in Australian Constitutional theory.

97. *Payroll Tax Case* (1971) at 395 per Windeyer J. This passage trades on two different senses of "compact" with separate Latin roots: *pangere* - "to fasten" and *pacisci* - "to agree". The latter was presumably originally derived from the former, perhaps through the metaphor that an agreement "fastens" upon a particular arrangement, or perhaps because *pangere* also meant to fix - to write - in wax, as agreements often were.

Chapter 9 - Other theories

This chapter deals with a number of miscellaneous theories about obedience to the Constitution which have occasionally been raised in an Australian context. It also touches briefly on some of the issues central to debates over the legitimacy of the US Constitution. First I examine why judges might have special obligations to obey the Constitution by virtue of their office, obligations which do not apply to subjects generally. Second, I investigate Dworkin's political theory of "associative obligations" to obey the law. Finally, I analyse a theory which emphasises the Constitution's embodiment of values such as human rights and democracy. Some have suggested that this embodiment itself can legitimate a Constitution's authority.

9.1 Judicial obedience

Does the judicial office provide any special reason for judges to anchor their decisions to the constitutional text?

9.1.1 **Judicial authority derived from *following* the constitution**

One might argue that authority is conferred on judges only so that they can facilitate their constitution's coordinating role. This argument removes judges from the centre of constitutional theory. On this view, a constitution, and the system of laws it authorises, are not designed principally to guide the judiciary. The social coordination promoted by a constitution is achieved primarily through the obedience of legislative and executive officers, and ordinary citizens. Judges authoritatively interpret authoritative rules, and direct coercion accordingly. But adjudication is an adjunct to rather than the focus of governing a society through rules.¹

A fallacious objection to this view must be eliminated. It might be argued that as judges clearly make law, the judiciary's legitimate function cannot be restricted to applying the constitution to promote coordination. However, "making law" *may* be characterised as a necessary consequence of applying the Constitution. Rules are inevitably vague in *some* applications; and refusing to apply a rule whenever it is ambiguous may amount to failing to apply the rule at all. For example, s.51(20) provides that the Commonwealth Parliament may make laws "with respect to ... trading or financial corporations". Is a corporation to be

1. I defend this view of the social role of judges and the Constitution in Chapter 10. The alternative view, which places adjudication at the centre of the analysis of legitimacy is rejected at [9.3].

characterised as a “trading” corporation because its original purpose was trading, because its activities are *predominantly* trading, or because its activities are *substantially* trading?² Resolving this question ultimately requires a judgment about the purpose of the provision. Where a text is semantically ambiguous, its application *requires* a choice between alternative meanings, and thus a judgment about the point of the provision. In this way, applying a rule *at all* sometimes requires “making law”. Those who believe in “judicial restraint” see judicial law-making as legitimate only if it is “interstitial”.³ Judicial law-making is a necessary by-product of applying constitutional rules, but it is not necessarily the aim of judicial review. Thus even though judges do “make law”, their legitimate function might still be primarily to implement the Constitution.

Nevertheless, there is a more cogent objection to the claim that judicial authority is limited by the purposes for which it was granted. The claim implicitly appeals to an element of the legal doctrine of *ultra vires*: a power should not be used for purposes other than those for which it was conferred.⁴ Is this element of the *ultra vires* doctrine always morally compelling? If the practical consequences of disobedience are desirable, why should a judge be confined by the purposes of the conferral of power? Judicial legitimacy need not be limited by the original purposes of conferring judicial authority.

9.1.2 Court bound by constitution because created by it

A similar argument is that judicial authority is itself derived from the text. Consequently, some think, it would be incoherent for a judge to claim that the Constitution authorises the judge to act, but to deny that the Constitution settles other questions. The argument has some judicial exponents. For example, Kirby J claimed that:

The Court whose jurisdiction [the plaintiff] has invoked is created by the Australian Constitution. It is bound to act within the powers conferred by that instrument.⁵

Similarly Brennan J said that:

The Court, owing its existence and its jurisdiction ultimately to the Constitution, can do no more than interpret and apply its text, uncovering implications where they exist. The Court has no jurisdiction to fill in what might be thought to be lacunae left by the Constitution. ...

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2. See *Adamson's Case* (1979); *Tasmanian Dam Case* (1983).
 3. Bell (1983) at 9-20 classifies theories of judicial law-making as “interstitial”, based on “consensus”, or to protect “rights”. The restriction of judges to “interstitial” law-making is a hallmark of “judicial restraint”: see Daley (1999).
 4. Finnis (1980) at 352-353 asserts that a ruler acting *ultra vires* perpetrates an injustice, both in taking more than a fair share of power, and in perverting relations with the ruler’s subjects. But this is merely a *prima facie* norm, which may be overridden if the failure to act *ultra vires* would itself lead to substantively unjust consequences.
 5. *Thorpe* (1997) at 693 per Kirby J.

Under the Constitution, this Court does not have nor can it be given nor, *a fortiori*, can it assume a power to attribute to the Constitution an operation which is not required by its text construed in the light of its history, the common law and the circumstances or subject matter to which the text applies.⁶

This theory was discussed at more length in Rhodesia when the legality of the coup in Southern Rhodesia was considered in *Madzimbamuto* (1968). The Rhodesian Court, appointed under the 1961 Constitution, was asked to consider the validity of acts pursuant to the revolutionary 1965 Constitution. One of the judges held that:

A court created by a written constitution can have no independent existence apart from that constitution; it does not receive its power from the common law and declare what its own powers are; it is not a creature of Frankenstein which once created can turn and destroy its master....

Once it is accepted, as, in my view, it must be, that this Court is sitting as a court of the [superseded] 1961 Constitution, it follows that, in determining what the law is on any given topic, it must be bound by that Constitution.... To hold otherwise is to abandon a stable anchorage and to set sail into uncharted and, indeed, unchartable seas.⁷

There are three objections to this argument. First, the claim that judges are bound by their constitutive document is self-defeating. A court cannot simply assume that it is limited by its constitutive document. The assertion that judges are limited by a constitution assumes that judges should rely on the “preconstitutional” norm⁸ that judges have authority only because of the constitution. Why does the court obey the document’s norms at all? Why cannot a court’s authority be established outside the document? The theory which provides answers to these questions cannot be derived exclusively from the constitution.⁹ The same preconstitutional theory may *also* entail that judges should go beyond the constitution in some circumstances. Secondly, the moral authority of judges is ultimately based on the value of promoting the organisation of society according to law, not on the constitutional document.¹⁰ Thirdly, effective judicial authority is not limited by the constitutional document, but by the attitude of government and the general populace. As the majority in *Madzimbamuto* (1968)

6. *Theophanus* (1994) at 143 per Brennan J (reference omitted). Deane (1976) at 80 expressed a similar attitude.

7. *Madzimbamuto* (1968) at 430, 432 per Fieldsend AJA. Fieldsend AJA thought that the Court should decide according to the 1961 Constitution, but nevertheless accept and enforce illegal revolutionary measures so as to avoid a vacuum in the law (at 438), albeit not so as to provide active support to the revolutionaries (at 440-441). The majority disagreed with Fieldsend AJA’s view that the Court was bound by the Constitution which created it: see below at fn 11.

8. The phrase is borrowed from Kay (1981).

9. Finnis (1980) at 275-276.

10. See Chapter 10.

held, the court's effective authority often depends not on the Constitution, but on the willingness of governmental power to enforce judicial orders.¹¹

For a court to act beyond its constitutive document may seem like a “stream rising above its source”. But such action is *logically possible* because courts are composed of people not merely academic constructions; it is *politically effective* if people obey, whether through fear or a desire to coordinate; and it may be *legitimate* if it serves some valuable end which outweighs the problems of breaching the existing constitution. These conditions are all particularly pertinent if a new constitutive order has in practice superseded the original constitution.

Few courts explicitly consider these questions. The Supreme Court of Ireland is an exception.¹² It has accepted that the legitimacy of both the Irish Constitution and the Irish judiciary are derived from “natural law” - principles of reason available to all self-reflective persons.¹³ Although there is some dissent, this natural law is not built on a religious foundation.¹⁴ Because the Irish Constitution itself recognises natural law as the basis of its legitimacy,¹⁵ it is not easy to identify judicial decisions unambiguously based on natural law but not the Constitution. Nevertheless Phelan insisted, contrary to the views of some Irish commentators, that the moral reasoning of natural law is the ultimate foundation of judicial decisions, and overrides the Constitution to the extent that it is inconsistent.¹⁶ However, at best there is only equivocal evidence of Irish judicial decisions using natural law norms to supersede Constitutional requirements. For all practical purposes, the Irish Constitution's requirements are definitive.

A broader argument might concede that the Constitutional document does not limit judicial legitimacy, but that judicial legitimacy is limited by the constitutional practices - the “small ‘c’ constitution” - of a country. However, the same argument will apply. The practical fact of popular and official obedience to judicial decisions provides judges with *de facto*

11. *Madzimbamuto* (1968) at 330 per Beadle CJ, at 365 per Quènet JA, at 410-413 per MacDonald JA.

12. Phelan (1997) at 271-322, 358-368 provides a useful summary of the extensive Irish literature on constitutional legitimacy, and its relationship with natural law. Kelly (1992) at 424-425 asserts that Ireland was the only jurisdiction in which a Thomistic conception of natural law survived in a non-religious legal system. It is not clear whether this, if true at any time, remains the case. Winterton (1986) at 232 notes a number of other jurisdictions in which judges have recognised that “human rights” precede posited law.

13. Phelan (1997) at 271-280.

14. Phelan (1997) at 280-290.

15. Phelan (1997) at 275.

authority. In rare circumstances it may be legitimate for judges to use this *de facto* authority to decide inconsistently with previous constitutional practices.

Thus it is unsustainable to claim that the High Court cannot morally act beyond the authority conferred on it by the Constitution. Nevertheless, as we shall see, there are *usually* very strong reasons for a court to act according to the Constitution's requirements.

9.1.3 Judicial oaths

Most judges swear an oath on taking office to uphold and apply the law. Justices of the High Court of Australia swear that they will:

do right to all manner of people according to law without fear or favour, affection or ill-will.¹⁷

Does the swearing of such an oath create a special obligation for a judge greater than that imposed on ordinary individuals?

In *Marbury v Madison*, Marshall CJ concluded his argument for judicial review with an appeal to the judicial oath:

The framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support. ...

Why does a judge swear to discharge his duties agreeably to the constitution of the United States if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.¹⁸

Wade assumed that oaths make a substantial difference to judicial behaviour, and presumably to the moral reasoning of those in judicial office. He suggested that altering the judicial oath might be a means to alter the UK doctrine of parliamentary supremacy. He claimed that:

there is every assurance that if the judges undertake upon their oath to act in some particular way they will do so.¹⁹

Hence, Wade claimed, the doctrine of parliamentary supremacy could be changed simply by altering the judicial oath.

16. Phelan (1997) at 292-297, 361-367.

17. *High Court of Australia Act 1979 (Cth)*, s 14, Schedule.

18. *Marbury v Madison* (1803) at 179-180.

19. Wade (1989) at 47.

The practice of swearing oaths on assuming an official position is widespread. Judges, legislators, jurors, and soldiers all swear oaths before beginning to perform their official duties. The point of an oath is more obvious if the oath-taker means to signify that breaching the secular obligation will also be a breach of a religious duty, and will then have spiritual consequences. However, in a more secular age, many will not recognise religious consequences as significant. There has been little analysis of the legal or moral status of oaths in societies where religious belief is not universal. But the law in Australia now recognises “affirmations”, in identical terms to oaths except for the reference to God. This practice suggests that there is more to the institution of oath-swearing than its religious connotations.

Is there a moral reason to keep an oath of office? Burton argued that judicial oaths make a moral difference: judges know what they are agreeing to, and have a real choice.²⁰ But these conditions are not sufficient for a promise to be binding. A promise is only morally binding if there is also some reason to pay attention to a person’s choice in such circumstances.²¹

To analyse oath-taking as a form of promising is possible, but strained. The typical oath - say of a witness swearing to tell the truth - is evidently different from the archetypal exchange of promises - say for the future sale of goods. There is often no recipient of the oath except the somewhat ill-defined “public”, and often no reciprocal promise *from* the public. And when an oath is required of a person taking an official role defined by other norms, the oath does little to enable individuals to structure their lives - the typical justification for promise-keeping [8.1.1]. Many oaths merely reflect an antecedent obligation. For example, the Court of Appeal said that an oath of allegiance has no legal significance, because:

Allegiance is not created by the oath, it exists apart from it.... The oath of allegiance does but consecrate the allegiance already existing. It is *ex provisione hominis*, as stated in *Calvin’s Case*.²²

Another argument for keeping oaths is that individuals who assume judicial office receive the status and rewards of office personally, and so have a personal obligation to keep the oath which is required as a *quid pro quo*. However, this obligation, based on personal

20. Burton (1992) at 218.

21. Raz (1995) at 361; see also [6.3.2] for a more detailed discussion of this argument.

22. *Markwald* (1918) at 624 per Lawrence J (reference omitted), who was quoted and affirmed on appeal to the Court of Appeal. The passage was quoted with approval in *Madzimbamuto* (1968) at 365-366 per Quènet JP in his consideration of whether an oath bound a judge to uphold the Constitution under which the judge was appointed.

interest, may count for little when the judge believes that a decision would be seriously unjust to others.

Perhaps the best analysis of oaths is that they have a *psychological* rather than *moral* effect. By concentrating the minds of oath-swearers on the social institutions in which they participate, oaths attempt to ensure that individuals appreciate the moral value of acting in accordance with these institutions rather than making decisions simply on the basis of immediately apparent reasons. Thus oaths do not change the reasons otherwise applicable to oath-swearers, but they may change the oath-swearers' appreciation of those reasons.

Assuming that oaths do create additional moral reasons, what follows for the duty to obey the Constitution? In the United States, it is controversial whether the judicial oath distinguishes between fidelity to the Constitutional document, rather than constitutional practices. For example, Judges of the Supreme Court of the United States swear "to support this Constitution".²³ Perhaps the capital "C" suggests that the primary duty is to the Constitution's text rather than the complete set of "small c" constitutional rules including precedent. This presumably lies behind Melvin's assumed premise that the judicial oath requires adherence to original intent.²⁴ By contrast, Monaghan claimed that:

"Justices of the Supreme Court take an oath as members of an institution, the Supreme Court, not as isolated [nomads]. In the Anglo-American [courts], tradition and precedent are important sources of law for courts"²⁵

This American controversy is academic in Australia where the oath is not to "the Constitution", but to "do right ... according to law". The Australian judicial oath might create an additional obligation to act according to law, but it only creates obligations to obey the *text* of the Constitution to the extent that the text identifies Australian law [cf 4.3.2].

In conclusion, the better view is that judicial oaths do not create new moral obligations, but merely draw attention to existing obligations. Even if the oath of a High Court Justice does alter the Justice's moral duty, it does not imply obedience particularly to the Constitution.

9.1.4 Role morality

A final argument is that obeying the Constitution is an intrinsic part of the judicial role. The argument assumes that "role morality" is somehow different from "personal

23. US Constitution, Art VI.

24. Melvin (1982).

25. Monaghan (1995) at 184, n 43. Similarly Brest (1990) at 258, n 80 asserts that the oath "must be understood in the context of two centuries of constitutional decision making".

morality”. Role morality can be justified in functionalist terms: it promotes doing the job “effectively”.²⁶

A social role can provide reasons to act. Social institutions may rely on participants discounting certain considerations so that the net effect of the institution maximises the common good. Classically, a barrister’s partisan stance is justified on the basis that it contributes to legal institutions which are the best means for discovering the truth. Nevertheless, whether one chooses to carry out the duties of a role is ultimately a moral choice.²⁷ The player of a social role, as Burton pointed out, remains a person who is morally obliged to balance the consequences of his or her actions.²⁸ On the one hand are the consequences of acting contrary to the role’s norms, particularly the damage to the social institution and its capacity to contribute to the common good. On the other hand are the consequences of an unjust action in accordance with the role.²⁹

Nevertheless, the belief that “as a judge I should act so” is widespread [1.3]. The adoption of role morality may be unreflective, but it is often how people think. The results of such an unreflective position are not necessarily unjustified. Actions in accordance with the “judicial role” may in fact have substantive justifications.³⁰

9.1.5 Conclusion

Judicial obligation to obey the Constitution ultimately differs little from whatever obligations apply to all members of the polity. The derivation of judicial authority from the Constitution, judicial oaths, and the judicial role impose obligations on judges only if judges are also subject to obligations which would apply generally to subjects.

However, different considerations may apply to judges. On the one hand, the prominence of judicial disobedience may cause greater loss of popular confidence in the Constitution [3.3.3]. On the other hand, because of their *de facto* authority, judges can sometimes provide new norms which coordinate effectively even though they are disjoint from the previous system of authority [10.3.2-10.3.4].

26. Emmett (1966) at 162.

27. Downie (1971) at 133, 142. The conclusion can only be attacked if one denies the existence of any common morality: such extreme relativism is neither a good description of our society, nor appealing as moral argument (Luban (1988) at 107-111).

28. Burton (1992) at 108.

29. This conclusion is ultimately also reached by Luban (1988) 128-147, after discussing in more detail the various considerations for players of social roles.

30. Kay (1997) at 47.

9.2 Associative obligations

Dworkin developed an alternative theory of political and constitutional legitimacy in *Law's Empire*.³¹ Dworkin tried to develop “integrity” as a political morality distinct from ordinary morality because it avoids “arbitrariness”. He argued that “integrity” was the best interpretation of political institutions, because it fits existing practices, and because it shows them in the best light. He claimed that integrity creates political obligations because it shows a concern for subjects which is special, personal, pervasive and egalitarian, and these grounds are sufficient to create other accepted communal obligations, such as friendship.

9.2.1 Integrity

Dworkin tried to define integrity as a distinctive concept which identifies *political* morality as a subset of morality in general. This attempt ultimately fails. His exposition of integrity ultimately collapses to a claim that laws should, where possible, be based on moral reasoning.

Dworkin defined “integrity” as the attempt to develop coherent law, and in particular to reject “checkerboard” statutes which embody “internal compromises”.³² He gave a number of examples of laws which embody an “internal compromise”: abortion illegal only for women born in even-numbered years; racial segregation on buses but not in restaurants; strict tortious liability for manufacturers of cars but not washing machines;³³ and capital punishment for a random selection of those convicted of serious crimes.³⁴

Dworkin appealed to an intuition that checkerboard solutions are unacceptable.³⁵ He claimed that we instinctively reject arbitrary distinctions, but accept compromises based on “principles”, even if we do not accept some of those principles.³⁶ Thus even an opponent of abortion would prefer a statute which permitted abortion only for women who had been raped rather than a statute which permitted abortion only for women born in even-numbered years.³⁷

However, Dworkin’s appeal to intuition is flawed. To a person who believes that the life of a foetus is valuable, but a woman’s choice is of *no* importance, both statutes are equally

31. Dworkin (1985) at 176-224.

32. Dworkin (1985) at 178-184.

33. Dworkin (1985) at 178.

34. Dworkin (1985) at 436.

35. Dworkin (1985) at 179.

36. Dworkin (1985) at 183.

37. Dworkin (1985) at 183.

wicked. Dworkin's example only appeals because most readers consider both women's autonomy and the life of a foetus to be valuable *to some extent*. For some readers, autonomy will be more important than the life of a foetus; for others, the reverse. But *both* groups would prefer a statute which permitted abortion for women who had been raped rather than a statute which permitted abortion depending upon women's birthdates. For *both* groups, the former statute approximates more closely to their values. The intuitive objection to "arbitrary" statutes is no more than a dislike of manifestly sub-optimal outcomes. The intuition does not support Dworkin's claim that an "arbitrary" statute is worse than a statute which is based on mistaken moral reasoning.

From the points of view of two bargaining parties with different value systems, the checkerboard law is sub-optimal: there exist other compromises which *both* parties would prefer. From the point of view of the state personified, the checkerboard law is manifestly unreasonable: there exist other laws which would better implement *all* of the values in play. From all points of view, one does not need Dworkin's "integrity" to explain the distaste for a checkerboard statute: it is simply that such a statute is not merely arbitrary but irrational. Thus Dworkin cannot extract from the intuition a suggestion that state action *undictated* by principle is wrong: he has merely demonstrated that state action *contrary* to principle is wrong.

This fatally undermines Dworkin's further claim, based on a desire to avoid "arbitrariness": that given two conflicting principles, the relative weight given to them by a legislative solution "must flow through the scheme, and ... other decisions, on other matters that involve the same two principles [should] respect that weighting as well."³⁸ The fact that values are balanced in a particular way at one stage in a legislative scheme is simply no reason at all to balance them in the same way at another stage. If there is reason to balance the values, but no reason to choose a particular point within a range, then it is not irrational to balance them in different ways within that range at different stages of the legislative scheme.³⁹

Thus it is poor description to claim that a particular balance of values usually flows throughout a legislative scheme. Nor is it morally appealing. Intuitions about checkerboard

38. Dworkin (1985) at 436, n 7.

39. The particular solution chosen to resolve two conflicting values *may* restrict the range of rational choices for an otherwise arbitrary related question. For example, having decided that coastal navigation aids are a federal rather than State responsibility (s 51(7)), it would be irrational to fail to transfer members of the State bureaucracies responsible for those matters to the Commonwealth public service (s 69).

statutes merely demonstrate that the state should not choose *irrational* solutions. They do not demonstrate that every aspect of a state decision should be rationally determined.

Thus the sustainable aspects of Dworkin's "integrity" collapse to the claim that laws are, and should be where possible, based on reason. Where a principle applies, and there is no countervailing principle, then there is no reason to create an exception. To that extent, integrity is both an adequate description and an appealing prescription. However, so described, integrity is no more than a requirement that the state not act immorally. "Integrity" does not mark off a distinctive field of public reason. "Integrity" would be a distinct form of reasoning if it required that any particular balance between conflicting principles pervade the legal order. But if this is an essential element of integrity, then the concept is neither good description nor appealing prescription.

9.2.2 Political obligation

If "integrity" is stripped to the claim that political arrangements do and should reflect moral reasoning, what remains of Dworkin's argument for political legitimacy? The argument becomes that political arrangements which reflect moral reasoning create political obligations because they show a concern for subjects which is special, personal, pervasive and egalitarian, and these grounds are sufficient to create other accepted "associative obligations", such as friendship.

The argument is clearer if we reason forwards from the premise. Dworkin assumed that we should act in accordance with obligations of friendship,⁴⁰ and then argued by analogy that we have political obligations. He claimed that we do (intuitively) have associative obligations to friends: the crucial features of "associative obligations" are that they:

- create special duties - they only pertain to group members;⁴¹
- are personal - they are owed between group members,⁴²
- are the result of concern for the well-being of all group members,⁴³ and
- treat the interests of all members as equally valuable.⁴⁴

40. Dworkin (1985) at 195-202. Dworkin (1985) at 207 clarifies that this assumption is held out as *prima facie* argument: Dworkin offers no account of what is worthwhile about friendship; instead he invites opponents either to deny that friendship is valuable, or to show why the analogy with political association is inappropriate. A more substantive argument for the value of friendship is discussed in Finnis (1980) at 139-144.

41. Dworkin (1985) at 199.

42. Dworkin (1985) at 199.

43. Dworkin (1985) at 200.

Because Dworkin does not explain why friendship is valuable, he has little basis to claim that *these* are the necessary and sufficient conditions of friendship. But that hurdle might well be surmounted.⁴⁵ Next Dworkin claimed that political association is not different in any relevant respect from friendship. Let us grant this claim.

At this point Dworkin makes an entirely undefended assumption:

We also have no difficulty in describing the main obligations associated with political communities. The central obligation is that of general fidelity to law, the obligation political philosophy has found so problematic.⁴⁶

But why is the obligation *to obey the law* a necessary result of being in a political community? Assume that a political community creates “associative obligations” as Dworkin described them. We then have moral obligations which are special, personal, pervasive and egalitarian. We should treat other members of the community with particular concern greater than people who are not members of the community; these obligations are personal, they are owed by each member to each member; and we should treat each member within the group equally. But why should we deal with them *according to law*? The fact that they so treat us is no answer. Dworkin has already rejected the claim that fair play requires us to reciprocate whatever others provide to us.⁴⁷ And he has also rejected the claim that precise reciprocity is required by associative obligations.⁴⁸

Dworkin did not support his claim that the *content* of a political associative obligation is to obey the law. Perhaps he might argue that this is the best “interpretation”. But he provided no justification for believing that the obligation to obey the law is part of belonging to a political community. At most Dworkin could argue that this is a universal *description* of political communities. But then Dworkin’s argument amounts to the bare claim that because all political communities require their members to obey the law, there is a moral requirement to do so. The naturalistic fallacy remains a fallacy even when dressed as interpretation.

9.2.3 Interpretation

In any case, how can one have an “interpretation” of a moral norm such as political obligation? The claim that one should act in accordance with an “interpretation” must itself

44. Dworkin (1985) at 200-201.

45. See Finnis (1980) at 139-144; Finnis (1998) at 114-115 on the values of friendship, and the consequent obligations.

46. Dworkin (1985) at 208. Dworkin (1985) at 206 makes exactly the same leap, claiming that political obligation includes the obligation to obey the law.

47. Dworkin (1985) at 193-195.

rely on a moral argument which Dworkin did not supply. If he did so, then the logic of that moral argument might well also provide conceptual tools with which to construct an obligation to obey the law, without the intervening device of “interpretation”.⁴⁹

9.2.4 Conclusion

Dworkin’s theory of political obligation does not assist us. His device of integrity does not define political obligation distinctively from moral obligation. His argument is only plausible because it relies on inadequately analysed intuitions about arbitrariness. His exposition of an argument to obey law is also unsuccessful. Dworkin relied on plausible intuitions that participating in a community is valuable. But he had *no* argument to show that we should do so *according to law*. There is no argument to show that this is the best “interpretation” of political practices, other than the bare fact that many people believe that they have such an obligation.

9.3 Constitution as protector of rights and democracy

Dworkin also exemplified another tradition which claims that the legitimacy of law stems from its protection and promotion of individual rights and liberties. The advocates of this claim are sometimes more arguing for the legitimacy of judicial interpretation and enforcement of “constitutional law”, rather than arguing for the legitimacy of the Constitution itself or of law in general. Another version of this theory also tries to justify legal institutions as promoting democracy. However, judicial review, the authority of Constitutional text, and law, are primarily justified by their role in *constituting* society and government. Whilst the judicial protection of individual rights and democracy is sometimes valuable,⁵⁰ legal institutions, including judicial review, would be justified even if this were not their primary focus.

9.3.1 Law as a constraint on government

In Dworkin’s view, the primary purpose of law is to *constrain* government. Law should both prevent government from infringing individual rights excessively, and should ensure that whenever law does infringe individual rights, it provides individuals with fair warning that it will do so. He claimed that:

48. Dworkin (1985) at 199.

49. This attack on the coherence of an argument based on “interpretation” is based on Rubinfeld (1998) at 201-203.

50. But not always: complex questions of institutional choice are involved.

Our discussions about law by and large assume, I suggest, that the most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way. Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.⁵¹

This view is widespread in the United States. American jurisprudence has long been focused on Bickel's "counter-majoritarian difficulty" - how might judicial review be justified despite its potential to overrule the decisions of elected officials?⁵² The standard response is that judicial review protects human rights and fundamental values, as well as reinforcing democracy itself by ensuring adherence to democratic procedures.⁵³

For example, Sager emphasised the judicial role in protecting individual rights as the primary justification for judicial review:

To make sense of our constitutional practice, we have to see it as justice-seeking - that is, as serving the end of making our political community more just.

In general, justice is concerned most clearly and centrally with avoiding various nasty states of affairs - prominent failures to treat individuals and groups fairly. This focus on the negative, and further on the urgently negative, is especially apt to *constitutional* justice.⁵⁴

Similarly, Brest argued that a "constitutional practice" should:

(1) foster democratic government; (2) protect individuals against arbitrary, unfair, and intrusive official action; (3) conduce to a political order that is relatively stable but which also responds to changing conditions, values, and needs; (4) not readily lend itself to arbitrary decisions or abuses; and (5) be acceptable to the populace.⁵⁵

Brest's ordering of these aims was deliberate. He thought that the central issues for constitutional practice are promoting democracy and protecting individual rights from abuse by government:

Central to our constitutional order are the related though not always compatible concerns for individual rights and decision making through democratic processes.⁵⁶

He saw judicial review on substantive moral grounds as a key weapon in that battle.

51. Dworkin (1986) at 93

52. Bickel (1980) at 16.

53. Ely (1980) *passim*; Brest (1990) at 253

54. Sager (1998) at 238, 248.

55. Brest (1990) at 244.

56. Brest (1990) at 244.

9.3.2 Focus on judicial review

These writers are often concerned more to justify “judicial review” rather than law. Much American scholarship has centred around justifications for judicial review rather than the authority of the US Constitution’s text. As Brest pointed out:

Our constitutional tradition, however, has not focused on the document alone, but on the decisions and practices of courts and other institutions.⁵⁷

Having rejected arguments that the *Constitution’s* legitimacy is based on the consent of the people, Brest immediately proceeded to examine the criteria for legitimacy of American *constitutional practice*, and in particular judicial decisions.⁵⁸ Similarly, Sager’s recent work concentrated almost exclusively on justifying the “constitutional practice” of the United States: he barely considered arguments which might justify obedience to the Constitution’s text.⁵⁹ Similarly, Grey emphasised justifying constitutional practice rather than the Constitution:

Where [substantive constitutional doctrine] arises “under” some piece of constitutional text, the text is not invoked as the source of the values or principles that rule the cases. Rather the broad textual provisions are seen as sources of legitimacy for judicial development and explication of basic shared national values.”⁶⁰

9.3.3 Judicial review, rights and democracy

Thus Dworkin, Brest, Grey and Sager all focused on judicial review and the virtue of the judiciary’s role in protecting individual rights and reinforcing democracy. All conceded, *sotto voce*, that certainty might matter. For example, Brest thought that textualism might be justified if a Constitution promoted “a political order that is relatively stable”.⁶¹ Later he asserted that text and original understanding are “important but not determinative. ... [T]hey create a strong presumption, but one which is defeasible in the light of changing public values”. He thought that text exerts the strongest claims when it is “contemporary” (and “thus likely to reflect current values and beliefs”), or if it specifies matters where “certainty is an important objective”.⁶² But nowhere did Brest explain why certainty might be an important objective.

57. Brest (1990) at 243.

58. Brest (1990) at 243-244.

59. Sager (1998).

60. Grey (1975) at 709.

61. Brest (1990) at 244.

62. Brest (1990) at 246.

The net effect of this technique is to suggest that certainty matters little, and is readily outweighed by judicial definition and protection of individuals rights and democratic processes.

This analysis might be apposite to the United States where judicial determination of individual rights is a central part of constitutional adjudication, and of political life. The vague text of the Bill of Rights may *textually* imply the desirability of wide-ranging judicial review.⁶³ This approach to political legitimacy reflects a deep distrust of government. It responds to a view of government as inevitably a leviathan, a natural consequence of society, whose native tendency to abuse should be checked by restrictive constitutional rules, and by judicial review. The central issue for constitutional law is not facilitating communal action, but restricting government folly.

9.3.4 Justifying law because it *constitutes* government

Of course, any sensible political theory must acknowledge both good and evil government action, and the role of constitutional text and judicial review in both. Nevertheless, by starting from the proposition that government is the primary source of the evil against which constitutionalism is directed, the theory alters rhetorically, if not logically, the “purpose” of a Constitution. The central argument for the legitimacy of a Constitution and judicial review becomes “restriction” on government, tempered only by a concern for “certainty”.

The analysis which I will propose in Chapter 10 reverses this order: it sees both a Constitution and judicial review primarily as part of a scheme to facilitate cooperative action, subject to counter-arguments in favour of preventing injustice. According to this analysis, the *first* purpose of law is to *constitute* government. I will suggest that there are powerful reasons for constituting government, because it enables the achievement of ends which benefit individuals through collective action.

9.3.5 Australian applications

This analysis, that law is primarily aimed at *constituting* government, should have special appeal in Australia, whose Constitution lacks the broad guarantees of the United

63. Graglia (1990) at 42-44 denies this reading of the United States Constitution. Read in context, its guarantees are tightly confined, and do not implicitly authorise judicial review of all morally offensive legislation. For a detailed analysis suggesting that the 9th and 14th amendments were not intended to give the courts broad licence, see Kay (1988) at 266-273.

States Constitution. It also accounts for the bulk of Australian constitutional litigation, and the bulk of the text of the Australian Constitution.

Nevertheless, Stokes tried to apply a theory of legitimacy to the Australian constitution which shares many features of the American political theory. He argued that we are bound by the Constitution because it is “a commitment to government in accordance with certain values, such as federalism, representative democracy and responsible government.”⁶⁴ The point of such a commitment, according to Stokes, is that it imposes political, legal and moral controls on government power so that it is not arbitrary. In his view, a commitment is valuable *only* if the Constitution operates more as a constraint on government than a constraint on individuals.⁶⁵

This approach may appear to differ from the American approach outlined: for Stokes purported to justify the Constitution rather than constitutional practices. But later discussion shows that the “Constitution” that Stokes justified is an emasculated document. On Stokes’ theory, the Constitution is only relevant to adjudication to indicate which basic values have been adopted,⁶⁶ and then only if these basic values are “fair and reasonable” and “constraints” on government.⁶⁷ Any further enumeration of these values in the Constitution is irrelevant, for judges should apply the “best interpretation of those values” rather than any original intent about their implementation.⁶⁸ Given the level of abstraction at which Stokes defined a constitutional commitment (he nominated “federalism” “representative democracy” “responsible government” and “free trade”⁶⁹), the text has virtually no substantive content, and imposes virtually no restriction on judicial choice. In effect, Stokes’ theory suggests that judges should make whatever decisions are necessary to promote individual rights and to reinforce democracy.

The same objection applies to the theories of both Stokes and the American writers already discussed. Stokes simply never deals with the claim that a Constitution might be justified because it facilitates coordination by making more determinate incommensurate, controversial, or vague choices. Why is a constitution to be justified primarily by its

64. Stokes (1994) at 268. Stokes later also nominated “free trade” as a value to which government might be committed: Stokes (1994) at 273.

65. Stokes (1994) at 272.

66. Stokes (1994) at 273.

67. Stokes (1994) at 272.

68. Stokes (1994) at 273.

69. Stokes (1994) at 273.

constraint on government, and not its facilitation of government?⁷⁰ Because the argument assumes that government will exist, it overlooks a crucial point of both law and Constitutional text: their role in *constituting* government.

9.4 Conclusion

None of the theories considered in this chapter assists much in justifying the authority of the Constitution. Judicial obligations differ little from general obligations; associative obligations do not explain the significance of obedience to law, let alone the written Constitution; and claims about “commitment” to the Constitution, rather than presenting a positive argument for the Constitution’s authority, more emphasise why judges should ignore the Constitution. Is a constructive argument for the Constitution’s authority possible?

70. There are other objections to Stokes’ theory. Why is “arbitrary” government to be avoided at all (cf [9.2.1])? He also suggests that the constitution to which a society is committed must be “fair and reasonable”. But why is a “fair and reasonable” constitution legitimate only if there is a “commitment” to it? Surely if norms are “fair and reasonable” there is an obligation to comply whether or not there is a “commitment”?

Chapter 10 - Constitutionalism

10.1.1 Introduction

If the Commonwealth Constitution is not supplied with moral legitimacy by the Imperial Parliament, the people, the Founders, or the federal compact, then why should we obey it? The same question could be asked of *any* constitution. This chapter proposes a more complex answer than simple catch cries that legitimacy resides in “the authority of the Imperial Parliament”, “the people”, “the constitutional compact”, or “the Founders”.

Previous chapters have attacked the prevalent theories of the obligation to obey the Australian Constitution. Their arguments for a moral obligation to obey the Constitution are demonstrably inadequate. My attacks on these theories oblige me at least to outline a plausible argument for an obligation to obey the Constitution. In providing an argument for constitutional legitimacy, this chapter can only be brief and incomplete. Political obligation is an immense topic, and the fundamental problem of political philosophy. I have neither time nor space to survey the literature comprehensively. Instead my aim is to outline a plausible argument, to be assessed on its merits, rather than as an exercise in textual analysis.

My argument is premised on several positions which are controversial questions of moral and linguistic philosophy. Again, there is neither time nor space to defend these positions comprehensively. I shall assume a form of moral realism in which practical reasoning brings us at least closer to the answers to at least some moral questions. I shall assume a plurality of basic moral goods, which are not lexically ordered. Therefore, there is no *a priori* reason to prefer values of equality and autonomy over other forms of human flourishing. There is also then reason to expect moral questions to have more than one acceptable answer where goods conflict. I shall assume that the correct perspective for judging the morality of a political action considers the effect of that action on all people, and ranks their interests equally. Thus moral judgments are independent of the identity of the person making the judgment. I shall assume that amongst the speakers of a language, the meaning of a text is not radically indeterminate. Thus although understanding text may be influenced by moral considerations, language can convey meanings which can be understood independently of the readers’ previous views of the world. I suspect that these positions are in fact widely shared. My claim is merely that my account of political obligation follows from these premises.

Many arguments in the twentieth century about constitutional legitimacy have been distracted by democracy. Beginning with the proposition that a state should be democratic, they proceed to justify the state's constitution and judicial review as preserving democracy.¹ Bickel summarised the crucial issue for his constitutional theory:

The root difficulty is that judicial review is a counter-majoritarian force in our system.² This key sentence embodies crucial assumptions: (1) democratic government (constitutional or otherwise) is legitimate; (2) the primary feature of political practice which requires justification is judicial review, not obedience to a constitution (democratic or otherwise). This view also has Australian adherents. Sackville wrote that:

The Court's [counter-majoritarian] role is to preserve the integrity of the very *processes* by which democratic and representative government operates in Australia and from which it derives its legitimacy.³

Similarly Wood claimed that there is *no* sound justification for courts to invalidate legislation except to safeguard the principle of majority rule at federal and state levels.⁴

This strategy is misguided. The purpose of the state is not to support democracy. Rather, the state has more fundamental, justifiable purposes, which have little to do with democracy. True, these purposes are better fulfilled by a democratic than an autocratic state, and democratic processes may have inherent moral features lacked by autocratic processes. But it is wrong to assume that these advantages of democracy are the fundamental motivations for political power, constitutions, or judicial review.

The argument of this chapter is more complex. In essence, it is the following. A system of authority is desirable to provide goods unobtainable except through cooperation, and to coerce desirable conduct. If the authoritative regime is itself substantially identified by a system of rules - a *constitution* - then the regime will fulfil these functions more readily, and will also possess rule of law advantages. However, this explanation fails to designate obedience to any particular constitution. Which constitution should I obey? I should obey that constitution which is generally obeyed within a state. Which constitution is generally obeyed? Ultimately, that constitution which people expect to be obeyed. This is usually, but not necessarily, the constitution promulgated in accordance with previous authoritative legal norms. However, a constitution should not be obeyed if an alternative constitution would be

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1. E.g. Holmes (1988); Ely (1980) *passim*, e.g. at 117.
 2. Bickel (1986) at 16.
 3. Sackville (1997) at 168-169.
 4. Wood (1996) at 171.

so much better that its improvements justify the uncertainties of revolution experienced even without coercion to prevent a change to a new constitutional order.

Thus the moral argument for obeying the Australian Constitution invokes a moral claim about the desirability of cooperation through the state, but also relies on the facts of acceptance of the Australian Constitution, the absence of better constitutions, and the designation of the Constitution by previous legal authority. *Each* step is part of the argument. This argument for the Constitution's authority may lack rhetorical flourish. But it explains the superficial attraction of alternative explanations, as well as their ultimate inadequacy.

10.2 The virtue of coordination

10.2.1 The virtue of coordination

A constitution usually establishes a regime to exercise further authority. Thus the legitimacy of a constitution depends on demonstrating the virtues of this further exercise of authority, and on the claim that a constitution is a desirable feature of an authoritative regime.

The conditions for legitimate authority have already been discussed [3.1.2]. Authoritative directives are legitimate if they coordinate, or if their application and enforcement promotes desirable conduct. Individuals are more likely to flourish if schemes for services such as health, education, or social welfare are coordinated.

Many worthwhile projects can only be achieved through coordinated action. However, achieving spontaneous coordination in many such situations is unlikely. Faced with a multitude of valuable options, people would select different projects. But often achieving *any* worthwhile end depends on unanimity which cannot practically be achieved through agreement. Only an authoritative regime, whose commands are treated by virtually all subjects as reasons for action, can solve such problems.

Such coordination depends upon authoritative directives being identifiable by their source. A directive cannot be coordinated if its content can only be identified through unguided consideration of the direct reasons. By definition, if coordination is required these direct reasons underdetermine what ought to be done.

Justice - a proportionate distribution of benefits and burdens - also often depends upon authoritative coordination. A just distribution of resources, even amongst unselfish people, is often achieved most efficiently by a coordinated system which reduces the overall cost of calculating and distributing burdens and benefits fairly. A central *calculation* will often cost

less than each person individually calculating a fair distribution. Similarly, a central *distribution* system may be more efficient.

In practice, it is also desirable to have authoritative cooperative schemes which are coercive. Coercion is morally valuable to coerce malefactors, free-riders, and those prone to weakness of will. Absent saintly behaviour,⁵ a system of authority solves more easily the problem of regulating immoral behaviour. This is a wide category. It includes the subjects of conventional criminal law - preventing and punishing offences against the person and property. Less obviously it includes private law - preventing and redressing distributive injustice which results, for example, from torts and the failure of contractual relations. The category also includes preventing and redressing more subtle forms of injustice such as the failure to contribute equitably to just schemes of redistribution, or the attempts to take an unfair share of finite resources. The organisation of coercion - the identification of acts as undesirable, the identification of culprits, and their punishment - is an extensive cooperative enterprise. Thus social coordination of coercion is desirable in any society whose members are sometimes prone to weakness of will, poor moral reasoning, or selfishness. Such coercion is, in practice, essential to promote a fair distribution of goods and opportunities within a society.

However, authoritative coordination is necessary more to structure systems of coercion than to define activities as immoral. A regime might effectively deter anti-social behaviour by empowering institutions to seek out and punish undefined “immoral behaviour”. Such a regime might well effectively deter many forms of immorality. However, authoritative coordination *is* required to designate the institutions responsible for coercion, and to provide them with resources for the task. As Schauer pointed out, an effective coercive scheme does not need substantive rules, but it does need authoritative jurisdictional rules.⁶

Of course, defining immoral acts by authoritative rules promulgated in advance of people’s behaviour also serves the values which lie behind the rule of law. Authoritative identification is particularly important when the boundaries of morality are vague. To this extent there are also good reasons to support a regime which authoritatively defines which acts are immoral and merit official sanction.

5. Angelic behaviour does not require authority, for angels are spirits without need of coordination.

6. Schauer (1991a) at 168-173.

Social coordination, whether for positive goals, or to deter immoral behaviour, is desirable at a number of levels. As we tease apart these levels, the role of a constitution becomes apparent.

	Level of coordination problem	Example	Response
1a	How do we coordinate individual problems?	Who will collect the garbage, and on what day?	designate solution by system of authority
1b	How do we choose between coordination schemes?	Do we collect the garbage more often, or do we improve music education at the local school?	designate solution by system of authority
2	How do we choose between systems of authority?	Are the answers to (1a) and (1b) decided by a unicameral or bicameral legislature, or by an executive? Which individuals are entitled to exercise the powers of these institutions?	designate system of authority by constitution
3	How do we choose between constitutions?	Are the answers to (2) decided by some previous constitution, or by a new revolutionary rule, or some combination?	?

As level (2) suggests, a modern society must choose between any number of possible but incompatible cooperative ventures. Effective cooperation depends on general compliance with only a particular subset of cooperative schemes. Absent unanimity, only a system of authority can solve the coordination problem of selecting between cooperative ventures.

But *which* system of authority? As level (3) suggests (and leaving aside the various forms of non-democratic regimes), coordination could be provided by any one of many systems of authority, with presidential or Westminster structures, with unitary or federal legislatures, with one or more elected houses, with more or fewer members, chosen from differently constituted electorates. There is no “best” system for choosing coordinating directives - certainly we cannot expect unanimous spontaneous convergence to any particular system. In Raz’s terms, moral reasoning underdetermines the means to pursue coordination.⁷

10.2.2 Coordination and different ethical theory

The argument from coordination (as I shall call it) does not depend on Raz’s particular ethical theory. A number of quite different ethical theories converge on the desirability of schemes of authority, themselves identified by rules, even in societies where everyone behaves perfectly reasonably. Finnis and Raz relied on the incommensurability thesis. According to this thesis, there are a multiplicity of incommensurable goods. In a particular situation, there may be a number of desirable options, only one of which can be achieved, and

then only by cooperative action. There is then no reason to pick any one option rather than another, but there is good reason to pick one rather than none.⁸ An authoritative norm provides the necessary impetus to achieve cooperation towards one of these desirable ends.

Alternatively, the same results might be generated by a utilitarian theory which denied that there are a multiplicity of incommensurate goods, but which admitted problems of vagueness.⁹ Assume that the “right” answer to the conflict of two moral values lies within a range. Although some answers are manifestly outside this range, there may be no means of telling whether a particular answer is the best possible answer. Nevertheless, there may be some other, non-vague moral reason to prefer universal behaviour in accordance with a specific answer which is “close” to the best answer, rather than to leave people to determine the matter for themselves. For example, a constitution for Australia might have disqualified as Members of Parliament those providing senior policy advice to the Commonwealth government, or those providing senior policy advice to any State government, or those deriving a significant portion of their income from government sources (such as academics). But even if the actual Constitution’s disqualification of those who hold “an office of profit under the Crown” was not the best possible resolution of the issue, the advantages of a (relatively) clearly defined answer, identifiable by its source rather than moral reasoning, outweighs any advantages of leaving the issue unresolved in the hope that practice might converge on a better answer.

Raz and Finnis separated questions which have a multiplicity of incommensurable answers from questions which have only one reasonable answer. Waldron divided the moral universe by separating issues about which disagreement is “reasonable” from “our sense of the moral urgency and importance of ... the things that (morally) *need* to be done and must be done by us, in our millions, together, if they are to be done at all.”¹⁰ Although Waldron seems reluctant to say so, there are some issues where disagreement would be “unreasonable”. In particular, he claimed that collective political action “needs” to be done. Depending on what values and syllogisms are defined as “unreasonable”, his theory of disagreement can classify questions into the same two sets as the incommensurability thesis.

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7. Raz (1998) at 171-172. Similar reasoning underlies the constitutionalism of Alexander & Schauer (1997) at 1371-1377; and see also the summary of the positions of various scholars in Alexander (1998) at 1-15.
 8. Finnis (1980) at 231-232; Raz (1998) at 168. Raz (1986) at 321-366 provides a more detailed exposition of Raz’s theories of incommensurability.
 9. On vagueness, see Williamson (1994).
 10. Waldron (1999) at 117.

Alexander's theory of political morality is more pragmatic, but generates similar results. He suggested that one should obey the best set of political arrangements to which one can gain sufficiently "wide agreement" that they can be imposed on *all* members of society.¹¹ Alexander assumed that there is wide agreement that imposition of a set of political arrangements is preferable to anarchy.¹² However, wide agreement on a particular set of political arrangements is unlikely in the absence of authority. In essence therefore, Alexander divided questions upon which there is sufficiently wide agreement that answers can be imposed on dissenters even in the absence of authority, from questions upon which there is no such agreement.

These theories have common features. They all posit a single right answer to the question whether revolution or anarchy are worse than the imposition of a reasonably just political system.¹³ They all claim that there is a multiplicity of answers to the question of which political system is most just. And they all combine these two propositions to deduce that it is desirable to accede to a system of authority which determines the reasonably just political system for a particular community.

Thus what I shall identify as the argument from coordination has parallels in other ethical theories. Theories of incommensurability might say that there are commensurable moral reasons to have authoritative answers where options are incommensurate. Theories which acknowledge vagueness might say that there is a non-vague reason to prefer a specified answer rather than a vague prescription. Waldron might say that there is undisputed agreement (or at least no reasonable disagreement) that coordination is desirable to overcome the problems of disagreement. Alexander might say that there is "sufficient agreement" to the same proposition. In either case, the argument from coordination is a necessary consequence.

10.2.3 General compliance necessary for coordination

The benefits of coordination are only available if members of a society do, as a matter of fact, generally comply with a particular system of authority. They are only likely to do so if participating individuals *expect* that there will be continued general compliance.

11. Alexander (1998) at 1-4.

12. Alexander (1998) at 2 suggests that political arrangements must be "above *everyone's* anarchy threshold of acceptability" (emphasis added). However, the requirement for *unanimous* agreement here seems inconsistent with the remainder of his exposition which only requires "wide" agreement.

13. "Reasonably just" is an unacceptably vague criterion. The more specific concept of "legitimate regime" is fleshed out at [4.4]

What would count as “general compliance”? General compliance does not imply universal and perfect compliance. Legitimacy depends merely on sufficient compliance that the benefits of coordination are available. The compliance of those with power and resources to coerce others - often officials of the regime - is therefore more important than the compliance of ordinary individuals. At the same time, widespread disobedience by ordinary individuals may well frustrate achievement of goals which require coordination and on which a regime’s legitimacy depends.

Nor is *knowing* compliance necessary. Many Australians are unaware of the detailed contents of their Constitution [6.3.1]. But they act *as if* complying with constitutional rules. Such a high degree of consistency is not spontaneous. It results from individuals obeying junior officials in the usually correct beliefs that those junior officials treat more senior officials as authoritative, and those more senior officials treat the Constitution and legislation subordinate to it as authoritative.

How can general compliance, and the general expectation of general compliance, be secured?

10.2.4 Settling the location of authority by authority

A violent revolution may create expectations of compliance when it becomes well-known that the revolutionaries will coerce those disobeying their *ad hoc* commands. A popular revolution may create expectations of compliance because popular support for the leaders of the uprising is notorious. In both situations it will be obvious that general compliance with the previous regime is unlikely, insofar as the old regime’s directives are inconsistent with those of the new regime.

In more stable times, the picture is more complex. The system most likely to be obeyed today is that which was obeyed yesterday. One could compile a comprehensive catalogue of every official practice of yesterday. But it will be easier to investigate and describe a system in terms of its own norms of validity. And for this reason, the participants in yesterday’s system described their system in terms of those norms, rather than by comprehensively listing their practices. In Hart’s words, from an “internal point of view”, they would have referred to rule(s) of recognition.¹⁴ However, the use of basic rules to determine which directives are authoritative is not merely an *analytical* choice. There are good *moral* reasons to identify legal systems in this way. It is likely to be difficult to

14. Hart (1994) at 88-95.

investigate and describe every application of a system. In Hart's own words, analysing legal systems in terms of a rule of recognition will "remedy ... uncertainty".¹⁵

The internal point of view compels the analysis to go a further step. If one asks participants why their fundamental norms do not include an additional suggested rule, they will almost invariably appeal to historical enactments, or to immemorial practice, to establish that the fundamental norms are a closed set which may be augmented only by acts which follow procedures indicated by the original closed set of fundamental norms.¹⁶ The closure of the set of fundamental norms is no accident. Fundamental norms would provide little guidance to action if their membership could arbitrarily increase, so arbitrarily changing the set of authoritative rules.¹⁷ More certain guidance to action than unguided reason, remember, is desirable when unanimous obedience to a particular norm is worthwhile, and spontaneous convergence on such a norm is unlikely either because of incommensurability, reasonable disagreement, or deviance.

For example, in the United States the Constitution - a set of written rules - accepted in Philadelphia by a Convention, and then ratified by State Conventions, is generally accepted as an authoritative determination of which other rules are valid.¹⁸ The validity of that set of rules is not and was not established by appeal to further authoritative norms. Rather the participants in the system have appealed either to the "natural right" of a majority of electors to determine their system of government [6.4.2], or to the historic fact that the set of rules were accepted - usually with *express* consent - by most of those within a geographic area with effective control of resources in that area. So the easiest means to identify the current system of authority, and the means which maximises the certainty of the content of this system is to identify it by reference to the rules contained in "the Constitution" in 1787 and rules subsequently adopted in accordance with these rules.¹⁹

15. Hart (1994) at 94. Perry (1995) at 113-118, and Finnis (1980) at 3-19 show how Hart's use of an internal point of view and emphasis on the role of secondary rules is liable to collapse to an internal point of view which is fully critical and committed.

16. The existence of closure rules is seldom remarked. A rare exception is Kay (1988) at 255-257, although he seems to perceive "back-up rules" as a contingent fact which may or may not be established in respect of a specific constitution, rather than a fundamental feature common to all morally justified constitutions. Cf Dworkin (1985) at 46-48 who assumes that the archetypal constitutional closure rule (government action within power is not constitutionally prohibited) has *no* presumptive weight against the proposed extension of a constitutional prohibition.

17. Aroney (1995) at 271-272.

18. I discuss the impact of judicial interpretations below at [10.3.2-10.3.3].

19. For the moment I pass over questions of the authority for State Constitutions.

More usually, the closure of the set of fundamental norms is indicated by appeal to a further set of authoritative rules. It is usually easiest to coordinate choices about coordination by reference to some previous authority. As a matter of fact, most regimes claim authority on the basis of authoritative directives made by a regime which no longer has authority. There are good (i.e. moral) reasons to use an existing system of authority to designate its successor. As Finnis said,

[The] emergence of authority without benefit of prior authorisation requires of course, the definite solution of a vast preliminary or framework co-ordination problem: Whose say-so, if anyone's are we all to act upon in solving our coordination problems?... [T]hose general needs of the common good which justify authority, certainly also justify and urgently demand that questions about the location of authority be answered, wherever possible, by authority.... [V]ery commonly, the first authoritative act of unauthorised bearers of authority is to lay down directions for ensuring that in future the location of authority (whether in themselves or in their successors) shall be determined, not by the hazards of those process of arriving at unanimity from which they have just emerged as the beneficiaries, but by authoritative rules.²⁰

Others might scoff at a “lawyer’s desire” for a chain of title.²¹ However, the advantages of continuity are not merely speculative. Latham describes the South African need for “legal secession” because otherwise some citizens might have withheld their loyalty.²² The attempts to create an autochthonous Constitution in Pakistan²³ demonstrate the uncertainty which may be generated when a regime tries to claim inherent authority rather than merely succeeding to the authority of its predecessor. Winterton has suggested that once courts are compelled to accept the principle of “necessity” explicitly, they may start down a “slippery slope” towards legitimating other unlawful, and less desirable, changes in constitutional arrangements such as a coup d’état.²⁴ In Australia, the exhaustive procedures for the *Australia Acts*, enacted in both the United Kingdom and Australia, demonstrate a desire to ensure that the location of authority was settled *by posited law*, irrespective of which constitutional theory one subscribed to.²⁵

None of this denies that revolutions are possible, and that a new system may be created in ways inconsistent with its predecessor. However, where a revolution has not

20. Finnis (1980) at 249.

21. Kirby (1997a) at 1.

22. Latham (1937) at 528.

23. see Hogg (1989a) at 260-261.

24. Winterton (1986) at 238-239; Winterton (1998a) at 7; see also Kirby (1997a) at 5.

25. Goldring (1986) at 200; Watts (1987) at 134. Goldring (1986) at 200 suggests that the *Australia Act 1986 (Cth)* and the *Australia Act 1986 (UK)* served the “political purpose of placating those in Australia and the United Kingdom who would prefer that the Imperial link, if it is to be severed at all, be severed by Imperial action”. This “purpose” was surely subsidiary to the desire for continuity and legal certainty.

occurred, the best way to identify constitutional authority is usually by the use of previous authority, rather than a simple assertion of autochthony.

The identification of fundamental norms by previous authority reduces the norms to a canonical set of *rules*. The very point of authority is to identify by its source a rule which then provides a reason for action [3.1.1]. Such rules may themselves require reference to moral criteria in their applications, but they will not be authoritative, and they will fail to improve coordination, if they do not reduce the influence of at least some of the direct reasons [cf 3.1.2]. In practice, however, the fundamental norms of a country's legal system are only *partly* identified by basic rules. Normative judgments can remain important [4.3.2].

10.2.5 Australian application

Thus Australia's fundamental norms are substantially identified by enactment by the Imperial Parliament, or enactment by sources which derive their authority from enactments of the Imperial Parliament.²⁶ The remainder of the *Commonwealth of Australia Constitution Act 1900 (UK)*, the *Westminster Acts*, and the *Australia Acts* all contain valid basic rules for Australia.²⁷ Referring *exclusively* to the enactments of the Imperial Parliament to identify Australia's fundamental norms would exclude the arbitrary addition of other norms to Australian law.

Earlier I identified a set of fundamental norms which determine whether other norms are part of Australian law [4.3.1]. I suggested that the content of these fundamental norms is to a significant extent indicated by rules [4.3.2]. The written constitution of a state is often a convenient collection of a country's basic rules. But as the Australian example shows, the document formally labelled as "the Constitution" is often not comprehensive; nor need it provide a *complete* picture of the fundamental norms which identify a state's valid legal norms. The central argument for obeying such a Constitution is that it is a part - often the greater part - of the fundamental norms which solve a key problem of communal living: they authoritatively decide who will decide on further schemes for coordination.

My analysis has claimed that:

- coordination and coercion towards good ends are best achieved through a system of authority;

26. See Chapter 5.

27. State Constitutions are also valid sources of law, which may be analysed either as derived from valid enactments of the Imperial Parliament, or as authorised by the Commonwealth Constitution [8.2.6].

- this system of authority requires secondary rules - which are often contained in a Constitution - to designate other rules as authoritative;
- the most *convenient* means to describe these secondary rules, the means which provides the most *certainty* about their content, and the means which accords with the self-understanding of typical participants, is usually to define secondary rules by reference to a previous set of authoritative rules.

These are *explanations* of why participants in a legal system *do* obey a Constitution. But they are also *reasons* why participants in a legal system *should* obey a Constitution. Thus they play a double role in the argument. They suggest the most accurate means to predict the actions of others - upon which coordination depends. But they *also* provide a participant him or herself with good reasons to obey a Constitution.

10.2.6 Conflict between practice and authority

There is another layer of complexity. The analysis so far has assumed that general practice accords with a single set of authoritatively promulgated basic rules and norms derived from them. What if this is untrue? First, previous rules for a system of authority may be partially, but not completely, altered by revolution. Indeed, post-revolutionary systems are quite likely to refer on occasions to norms overturned by the revolution in order to determine the content of the present law [4.2.2]. The most convenient description of the post-revolutionary order will often be in terms of both pre-revolutionary and revolutionary directives concerning the location of authority. Secondly, judicial decision may be inconsistent with previous rules. Whilst not amounting to a “revolution”, they may undermine the conclusiveness of the previous system of authority.

Deviations from a system of authority may not be obvious. General practice may gradually evolve so that it can no longer be described in terms of the directives of a previous system of authority. In such a case, a complete description of the current system must refer both to the directives of the previous system, and the modifications in terms of subsequent general practice. So, for example, whilst the Australian Constitution is a good first approximation to the authoritative directives describing the current system of authority, a complete description would also have to note the pattern of general obedience to High Court precedents inconsistent with that Constitution. The very uncertainty of what counts as a “general practice”, and knowing whether it exists, are powerful reasons for generally preferring to continue to operate consistently with previous authoritative rules. The tendency to accept inconsistent *judicial* practice relatively readily is perhaps due in part to the relative

ease with which general judicial practice can be identified by reference to the decisions of the supreme court in the judicial hierarchy.

Thus there is reason to accept recent general practices as authoritative despite their inconsistency with previous authority. This does not necessarily imply that one should *create* new and inconsistent practices [10.3.3-10.3.4].

This analysis suggests there are good reasons to analyse a political community by reference to the directives of previous authoritative systems. This principle is overridden if no authoritative directive describes a pattern of general obedience in the past, either because an inconsistent practice evolved, or because an explicit revolution occurred. In this case the existing system of authority is best described as a combination of directives of previous authoritative systems and general practices. Acting in accordance with the best description of the existing system of authority is usually the most effective means to promote coordination.

10.2.7 Identifying a tradition

Is the appeal to past practice - to tradition - more concrete than appeals to the will of the people? How does one define the borders of the relevant community; how does one distinguish systemic change from mere deviation; and whose attitudes indicate the relevant authoritative rule, particularly when people differ, or have no opinion at all?

These questions are answerable because the possibilities are limited by the conclusions of the moral argument. We are looking for secondary rules which have been consciously articulated, which are coherent because articulated by a limited number of sources, and which specify lower order rules which are consistent with most individuals' behaviour in a specified time and place. These requirements are likely to specify an identifiable set of basic rules. Admittedly there is a limited degree of vagueness. Does one identify a set of basic rules which better fits recent practices of more people, or does one identify a set which accords more closely with authoritatively promulgated rules? Nevertheless, in societies with a strong tradition of legal continuity, many constitutional rules, at least in their application to particular situations, will not be indeterminate. Previously articulated rules will then closely match subsequent practice.

The moral argument also prevents an infinite regress through history. The argument suggests reasons to attempt to identify fundamental norms so far as possible in terms of basic rules which themselves have a limited number of sources. This creates a preference for describing a constitutional system by reference to a period of history where the location of

authority was clear as a matter of social practice. In an Australian context, there is no need to go beyond the authority of the Imperial Parliament in the period between 1788 and 1986 because it is easy to establish the fact of obedience (at least in Australia) to virtually all rules of and derived from this relatively discrete source.

Because there is an articulated argument about the structure and functions of a system of authority, it is relatively easily identified in practice. Compare this with the absence of a plausible theory for the importance of the will of the people, as a result of which it is impossible to identify what constitutes the will of the people [6.3.4].

10.3 Alternatives to obedience

10.3.1 Momentary analysis

The argument from coordination stresses the virtue of attempting to identify an authoritative system in terms of rules promulgated by previously authoritative systems. There is an alternative analysis.

Instead one could identify norms which identify law simply by the fact of the acceptance of these norms in the immediate past. For example, one could identify the fundamental norms of Australian law by recent judicial and academic formulations of the system of law in Australia, whether or not these sources were consistent with previous authoritative norms. This analysis would appeal to those who see the Constitution as a “living force”²⁸ - a synonym for the practice of constitutional law - rather than a set of rigid rules. On this theory, the benefits of coordination are available from general obedience to those rules which at any point in time are part of an ongoing practice.

A momentary analysis is also suggested by Deakin’s speech as Commonwealth Attorney-General on the *Judiciary Bill 1902 (Cth)* to institute the High Court. He said that:

[The constitution] stands and will stand on the statute-book just as in the hour in which it was assented to. But the nation lives, grows, and expands. Its circumstances change, its needs alter, and its problems present themselves with new faces. The organ of the national life which preserving the union is yet able from time to time to transfuse into it the fresh blood of the living present, is the Judiciary [-] the High Court of Australia or Supreme Court in the United States. It is as one of the organs of Government which enables the Constitution to grow and to be adapted to the changeful necessities and circumstances of generation after generation that the High Court operates. Amendments achieve direct and sweeping changes, but the court moves by gradual, often indirect, cautious, well considered steps, that enable the past to join the future, without undue collision and strife in the present.²⁹

28. *Theophanus* (1994) at 171-172 per Deane J.

29. Commonwealth, House of Representatives, *Parliamentary Debates* (18 March 1902) vol 8 at 10967-8 per Deakin.

Despite accepting judicial redefinition of the Constitution's rules, Deakin assumed that any judicial change of Australia's fundamental norms would be "gradual, often indirect, cautious [and] well considered". Why impose these constraints and effectively give the Constitution's rules a privileged status? This position implicitly itself depends on some argument for the legitimacy of existing rules, even if the presumption of their correctness is weaker. And the reasons for considering existing rules to be legitimate - promoting coordination through their certainty, predictability, and stability - are equally reasons to identify those rules so far as possible by reference to pre-existing rules.

10.3.2 Coordination despite disobedience

A momentary analysis has the apparent advantage of continually reassessing the virtue of each fundamental norm, and every rule promulgated within the legal system. It emphasises that many of the benefits of coordination can be gained without perfect compliance to authoritative norms. Rule-following is not an "all-or-nothing" affair. Officials are particularly able to break *some* of the Constitution's rules without entirely frustrating the benefits of coordination.

The practical operation of a system of authority may ensure that officials retain control over material resources and the actions of individuals, even if they transgress the Constitution's rules on some occasions. Constitutional rules which confer authority on a ruler also usually confer effective control of many resources and thus coercive power.³⁰ Given the salience of their position, their practical control of physical resources and coercive means, and their networks of personal (as distinct from rule-defined) loyalty, officials can promulgate coordinating rules, and reasonably expect general cooperation, even if those rules are contrary to the pre-existing constitutional order. Their personal effective control will usually persist even if there is *some* deviation from the constitutional order. The effect of deviations may be reduced by appealing to super-constitutional values such as religious, "true", or "popular" values.³¹ Mystique, respect, personal relationships, and the inertia of habit may all assist a regime to continue to control resources despite *partial* deviation from the Constitution's rules

If officials only occasionally ignore the fundamental norms as in force from time to time, people will generally continue to follow the legal practice of the recent past. Provided that in any short period of time officials do not repudiate too many of the Constitution's rules,

30. Beetham (1991) at 47-51.

31. MacCormick (1993) at 136 assumes that deviations will usually be justified in this way.

it might even be possible to replace *all* of that Constitution's rules without frustrating popular obedience to the legal system as it exists at any point in time.

Thus even if officials fail to obey all rules of the Constitution, their capacity to coordinate effectively may not be significantly impaired. And even if their capacity to coordinate is weakened, a breach of the Constitution's rules may be justified by the substantive good thereby achieved. It is at least arguable, for example, that a modern regime should create a national paper currency, even in the face of a constitutional prohibition, provided that the damage to other coordination schemes is limited.³²

This argument, to treat the Constitution's rules as merely provisional, is particularly applicable to judges. Judges are usually able to declare new basic rules which will be accepted, and will succeed in coordinating further exercises of authority, even if the rules posited by judges are contrary to *some* of the previous basic rules. Of course, one cannot take the acceptance of judicial authority for granted. There are isolated historical examples of other officers of the state defying, or coming close to defying, judicial orders.³³ But these are rare examples amongst all but universal practice in the UK, the US, and Australia, of obeying judicial decisions. As Ely commented, the possibility of a revolt against the judiciary is greatly exaggerated given the historical record.³⁴

10.3.3 The virtues of judicial disobedience

Should judges accept as authoritative a new rule disjoint from those accepted in the past, provided that the new rule appears preferable, and is not too radical a change?³⁵ In effect, Dworkin's theory of law as "interpretation" suggests such a methodology. Judges -

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32. The United States Constitution only confers power on Congress to "coin Money" (Art 1, s 8), and the Federal Convention voted *against* a proposal to grant Congress the power to print paper money. Nevertheless, after the civil war, both Congress and the Supreme Court upheld the issue of a paper currency on the basis that it was an inherent incident of the Federal power to borrow money on the credit of the United States: see Quick & Garran (1901) at 579-582. However, it is instructive that even though the decision was contra-Constitutional, and its real justification was the desirability of the outcome, the judgment *claimed* the Constitution's mandate on the basis that the issuing of paper money was inherently incidental to Congressional power to borrow money on the credit of the United States (Art I.8): see below [10.3.7].
33. Pearce (1991) at 189-109 provides isolated examples of the Commonwealth executive ignoring rulings of the courts and of the Administrative Appeals Tribunal.
34. Ely (1980) at 47-48.
35. For the moment I shall speak of "disobedience" and acting "contrary" to a rule. As I show below at [10.3.5], this is ultimately too simplistic. A more accurate but cumbersome description is in terms of giving relatively less weight to linguistic considerations and more weight to moral considerations in "interpreting" a rule.

and people - should accept a rule as valid if it is the best available compromise between the most morally desirable rule, and the best fit with existing practices.³⁶

The essence of “judicial activism” is that judicial legitimacy is based not only on judges facilitating coordination through definitively applying the Constitution’s rules, but on judges making wise and detailed judgments on the desirable direction for society. The vaguer the Constitution’s rules, the more plausible this argument becomes. One exponent of this view was Justice Brennan of the United States Supreme Court. He saw the US Constitution not as a system for coordination, but as a statement of broad principles authorising judicial decision. He discounted both the original understandings of the text,³⁷ and its “precise, at times anachronistic, contours”.³⁸ He rejected any “static meaning it might have had in a world that is dead and gone” in favour of “the adaptability of its great principles to cope with current problems and current needs”.³⁹ But as Graglia pointed out, on this view constitutional text has little if any meaning beyond what the court pours into it.⁴⁰ On Brennan J’s view, the Constitution is not primarily a mechanism for coordination, but an authorisation of wise judicial decisions. Similarly, Dworkin thought that judicial decisions which impose constitutional norms on a community are justified primarily because they encourage judges and others to make “principled” decisions,⁴¹ in accordance with sound political principles of liberty, equality and community.⁴²

An intermediate view concedes that judicial review may serve both functions: promoting coordination, as well as implementing moral values directly. Thus Munzer and Nickel saw the best form of government as one which both restrains and allows change, using a “legitimate text-based institutional practice.”⁴³

10.3.4 Presumptiveness and constitutional rules

Ultimately judges have no moral alternative but to balance the virtues of applying the Constitution’s rules against the advantages of the most morally appealing result - as the judge

36. As Alexander & Kress (1995) at 297-299 show, this theory assumes that there is a “right” way to compromise fit and justification; and given that assumption, the practice will gradually - but not immediately - converge on the morally best practice.

37. Brennan (1990) at 25-26.

38. Brennan (1990) at 27.

39. Brennan (1990) at 27.

40. Graglia (1990) at 40-41.

41. Dworkin (1985) at 70-71.

42. Dworkin (1996) at 32-35.

perceives it. The virtues of following a constitutional rule include any cooperation which that rule may facilitate in the ways already outlined. Rule following will also promote autonomy and provide other advantages discussed below [10.3.6]. Failing to follow *this* constitutional rule may also reduce confidence that other constitutional rules will be applied on other occasions, undermining their guidance of conduct so as to facilitate coordination and promote the rule of law in general.

As the discussion of authority showed, judges do, and should, treat legal texts “presumptively” [3.2.2-3.2.3]. The Constitution has “authority” in the sense that there are presumptions in favour of its prescriptions. However, judges do not necessarily treat it as providing *conclusive* reasons for action. The strength of the presumption depends on the costs of obedience, decision-making costs, the probability of judicial error, and the costs of mistaken disobedience, both by judges and subjects [3.2.2].

Thus a number of beliefs can make a judge more committed than others to rule-following:

- she thinks more moral questions are indeterminate or uncertain so as to increase the need for coordination through rules;
- she thinks that the text of rules provides relatively clear guidance to action;
- she values more highly the autonomy promoted by the rule of law;
- she sees failure to apply one rule as having a greater effect on confidence in other constitutional rules; or
- she has less confidence in her ability to improve on the moral judgments of the constitution, and authoritative directives in accordance with it.⁴⁴

Ultimately these are the motivations for “judicial restraint”. They are also the motives for emphasising a constitution’s role in coordinating through rules, and for discounting the desirability of judicial departure from these rules in pursuit of desirable results. They are reasons to minimise the role of morality in deciding whether to apply the text of a constitution. For many judges they justify denying that *in practice* there is *ever* sufficient reason to go behind the text of a constitution. Because an important part of the justification for this position is the capacity of rules to define validity *exhaustively*, such judges are also likely to be hostile to constitutional implications.

43. Munzer & Nickel (1977) at 1057.

44. Lack of confidence in a judge’s own moral judgment is linked to a belief that many moral judgments are uncertain, and hence the need for coordination is more prevalent.

By contrast, a judge will be less committed to following constitutional rules if:

- he thinks more moral questions have determinate answers so that spontaneous cooperation without authoritative rules is likely;
- he thinks that the text of rules provide relatively unclear guidance to action;
- he places relatively little value on the autonomy promoted by the rule of law;
- he thinks that failure to apply one rule will have relatively little effect on confidence in other constitutional rules; or
- he is confident in his ability to improve on the moral judgments of the constitution, and authoritative directives in accordance with it.

These beliefs may be sensitive to the subject matter at issue. For example, Brest accepted that text and original meaning are important where certainty is important, or lines are necessarily arbitrary. But he considered any fixed meaning less relevant when the court was faced with broad issues of equality or liberty.⁴⁵

10.3.5 Coordination and rule-following

The argument from coordination demonstrates the value of the rules identified by a constitution's text. The argument claims that sometimes there are no moral reasons to choose between various cooperative schemes, and that authoritative directives are then desirable. Such directives would be futile if they provided no more guidance than unfettered moral reasoning. The whole point of a rule is that it can be applied distinctly from its justification.⁴⁶

The argument so far has assumed a simple dichotomy between applying and disobeying a rule. On this simple model, linguistic conventions determine how a rule applies, and moral considerations suggest (sometimes) reasons for disobedience. However, posited rule and justification are not so rigidly divided.

Fuller claimed that a rule cannot be applied without reference to its purpose.⁴⁷ However, the argument from coordination suggests that Fuller's search for "purpose" may not always assist in constitutional interpretation. The purpose of many constitutional rules is merely to settle the location of authority for deciding on further cooperative schemes. This purpose may help little in interpreting rules which authoritatively determine, for example, the

45. Brest (1990) at 246.

46. Schauer (1991a) at 53-62.

47. Fuller (1969) at 81-91, 264-289.

size of the Houses of the Commonwealth Parliament.⁴⁸ Some constitutional rules may have a more specific moral purpose. For example, rules setting out the qualifications for members of Parliament are not entirely arbitrary. Parliament is more likely to act in the public interest if its members are reputable, and not financially reliant on the executive.⁴⁹ Nevertheless, the precise limits of any particular rule may well be underdetermined by moral argument. Fuller's claim that the "purpose" of a rule assists in applying the rule cannot go so far as to deny that linguistic conventions *can* be more or less determinative in applying a rule.

Moral argument may also be useful to illuminate the end of coordination in the circumstances. For example, moral argument may be capable of showing that it is desirable to have *a* rule about regulation of interstate trade and border tariffs. Either burdens should be prevented so as to promote the general economic well being predicted by economic theory; or they should be allowed so that State governments can encourage the growth of local industry. Section 92 of the Australian Constitution provides that interstate trade shall be "absolutely free". The rule *linguistically* indicates a choice between the two possible schemes of coordination.⁵⁰ The application of the rule may be assisted by reference to this purpose.⁵¹

The referent of a word is influenced by what justifications for the act described are plausible in the circumstances. For example, "paint the window" and "break the window" refer to two different things, as do "paint the window for the blackout" and "break the window where the wood is rotten".⁵² My understanding of "window" in each command is guided both by how "window" has been used in that language in the past, and by what meaning of "window" is plausible given everything I know about the context. A meaning is plausible because it describes an act either which I have experienced, or which is justified, or which I think that others might consider justified.⁵³

Thus understanding language involves me in balancing my knowledge of what is justified, what others think justified, and how words are commonly used. One can vary the

48. See *Commonwealth Constitution*, ss 7, 24.

49. See *Commonwealth Constitution*, s 44; *Sykes* (1992) at 95-96 per Mason CJ, Toohey and McHugh JJ.

50. Of course, there may be others.

51. *Cole* (1988).

52. Taylor (1995) at 264-289.

53. See *Mannai Investment* (1997) at 385-377 per Lord Hoffman.

relative weight given to pragmatic (i.e. contextual) considerations on the one hand, and a text's lexical and syntactical meaning on the other.⁵⁴

For these reasons, a more sophisticated version of the argument from coordination is comparative. It claims that the benefits of coordination are more available if one places *more* emphasis on lexical and syntactical meaning than pragmatic considerations. A restrained judge will be more ready to interpret words according to their more common usages, and will be less ready to interpret words by reference to what the judge thinks is justified. The justifications for doing so are ultimately the same as the justifications for refusing to allow moral outcomes to override the "meaning" of a constitutional rule.

10.3.6 Legitimacy and the rule of law

The benefits of coordination are not the only benefits of rule-following. Rule-following also promotes autonomy. By making the actions of other people and of government more predictable,⁵⁵ rules promote the capacity of individuals to plan and execute their own autonomous lives.⁵⁶

Dixon CJ argued that the fundamental doctrine of constitutional law in Britain is the supremacy of Parliament, in the US is the supremacy of the people, and in Australia is the supremacy of law.⁵⁷ Dixon CJ's description of the Constitution's authority does not include any moral argument about why a judge - or anyone else - *should* obey the Constitution. But the argument at this point can readily be made normative. As Thomson put it, fidelity to the Constitution "stems from a belief in and adherence to the rule of law."⁵⁸ To the extent that it

54. For a further discussion of how context may or may not ensure that a textual rule is unambiguous in a given situation, see Bix (1993) at 63-76; but affirming that context is not everything, see Marmor (1992) at 146-158. An example of how courts can give text more rather than less weight is the doctrine that penal provisions will be construed "strictly" - which may or may not favour the defendant: see Pearce & Geddes (1996) at 226-230.

55. A rule will only increase predictability if it restricts the number of considerations relevant to the decision, thereby either reducing the range of equally correct decisions, or reducing the possibility of erroneous decisions (Schauer (1991a) at 137-144). Rules do not always restrict the number of considerations. A rule may use a term so vague that its application invokes even more considerations than those relevant without the rule. Nor do fewer considerations always make decisions more predictable. If an additional consideration is only relevant when other considerations are equal, then the additional consideration increases predictability. But a consideration is only likely to have such a limited effect if its influence is itself governed by a rule.

56. Finnis (1980) at 272-273. Campbell (1996) at 59 characterised this idea as the "liberty advantage" of rules.

57. Dixon (1935).

58. Thomson (1985) at 1201.

is valuable to have a rule of law (in the thin sense of applying established rules), then the supremacy of law and thus the Constitution may be desirable.

However, state action is not *justified* by such rule of law advantages. The rule of law provides a reason to exercise authority through the medium of rules rather than less predictable discretions; it does not in itself justify the creation of a system of authority.

Rule following has a number of other justifications. Rules may provide psychological security, minimise conflict, promote impartiality, fairness and efficiency, promote socialisation, encourage good-decision making by officials, and allocate jurisdiction efficiently and appropriately.⁵⁹ Again, none of these arguments for rule-following is sufficient justification for obedience to an authoritative regime. Rather, they suggest that if there is to be an authoritative regime, it would often be better to achieve its ends through rule-defined norms. The argument from coordination, but not the rule of law, is crucial to the legitimacy of a regime: if a regime does not effectively promote coordination, then there is no point in enforcing its rules as such. Provided that a regime *does* coordinate, there are some reasons - but not necessarily conclusive reasons - to use rules as substantive guides for the conduct of its subjects.

10.3.7 Judicial assumption that constitutions matter

The continued acceptance of judicial authority *does* depend upon many believing that judicial decisions accord with the rules of a Constitution's text.⁶⁰ Or at least, judges *think* that the appearance of obedience matters. Almost all judicial decisions *claim* to be consistent with, and derived from, the constitutional text. Moral reasoning may be acceptable in divining the meaning of that text. But judges do not generally engage in free-standing moral reasoning to impose legal requirements which do not purport to be a consequence of the text. Although a few early US constitutional decisions were based on "natural law", more modern decisions in the United States such as *Roe v Wade*⁶¹ have *claimed* the authority of the constitutional text, however, tenuous that connection may be.⁶²

There is only one substantial exception to judicial claims that their decisions accord with the constitution. In a few cases judges have acted contrary to constitutional rules

59. Campbell (1996) at 53-61; Schauer (1991a) at 135-137, 145-162.

60. This is not a claim that people think that judges never make law; for constitutional rules often fail to determine a judicial decision. It is a claim that judges seldom make law *contrary* to existing constitutional rules.

61. (1973) at 153 per Blackmun J for the Court.

because their application “would lead to legal chaos and thus violate the constitutional requirement of the rule of law”.⁶³ Courts have appealed to “necessity” or the “value of the rule of law”, in order to justify acting contrary to the constitution.⁶⁴ Thus the Supreme Court of Ceylon was not prepared to declare constitutionally invalid all acts of the Ceylonese legislature, even if all of the acts had breached a constitutional requirement.⁶⁵ The Court of Appeal of New Zealand would not overturn an election whose writs were unconstitutionally issued.⁶⁶ The Supreme Court of Pakistan upheld the validity of executive action contrary to constitutional rules on the basis that it was necessary to preserve a large number of acts enacted over a seven-year period between 1948 and 1955.⁶⁷ The Court of Appeal of Cyprus upheld legislation purporting to abolish constitutional requirements for mixed Greek/Turkish courts, even though the constitution made these requirements unalterable.⁶⁸ The Supreme Court of Canada deemed valid for a limited period all the acts of the Manitoban legislature between 1890 and 1985 which had not been printed in French, as required by the Manitoban Constitution.⁶⁹ There are traces of a similar doctrine in Australia. In the *PMA Case* (1975), a majority held that a Parliament would be validly constituted, and could validly legislate, despite contravention of a constitutional requirement in calling the election for the parliament.⁷⁰

The common element of these cases is that courts were prepared to fail to enforce the constitution, and to validate action contrary to it, if the alternative would have undermined the very legal order created by the constitution. Judges have *expressly* contradicted constitutional requirements only when they could appeal to the values of coordination which (I have contended) are the primary reasons for obedience to a constitution.

62. Berns (1996) at 181.

63. *Manitoba Language Rights Reference* (1985) at 35 *per curiam*.

64. These doctrines, and the cases which I briefly describe below, are discussed in more detail in Hogg (1989a); Campbell (1994a) at 92-94.

65. *PS Bus Co* (1958), as described in Campbell (1994a) at 92. It is arguable that this decision was not *contrary* to constitutional rules because the court had a “discretion” whether to issue a prerogative writ; and the court cited the potential consequences of its order as a reason for refusing to exercise its discretion.

66. *Simpson* (1955).

67. *Special Reference No 1 of 1955* (1956).

68. *AG (Cyprus) v Mustafa Ibrahim* (1964), as described in Hogg (1989a) at 261-262.

69. *Manitoba Language Rights Reference* (1985).

70. *PMA* (1975) at 120 per Barwick CJ, at 156-157 per Gibbs J, at 178 per Stephens J.

Thus despite the theoretical possibility that judicial disobedience to the Australian Constitution could be justified, historically the High Court has not disobeyed it explicitly. Many would argue that some judicial decisions in Australia and the United States have *in fact* been deliberate attempts to contradict the Constitution's explicit norms, as judges have sought preferable outcomes.⁷¹ Nevertheless, unless buttressed by the claim that a decision would undermine the order created by a rule of law, the High Court, like other courts, has not been prepared to claimed such authority.⁷²

10.4 Intuitions about legitimacy

If the legitimacy of a constitution does in fact depend on the argument from coordination, many intuitions about legitimacy are explained.

10.4.1 Illegitimate regimes found legitimate regimes

A bloody and violent revolution, led by selfish and unjust rulers, can create a system of norms, in accordance with which authority is conferred on wiser heads. Eventually, with no break in authority, the system may become an enlightened democracy. Is this system legitimate even though a complete description of its norms requires reference to the original revolutionary norms? Alternatively, is the system illegitimate even though it appears to result in enlightened government?

If legitimacy is based on the argument from coordination, then this paradox is resolved. Current legitimacy often depends on continuity with a system in the past which was *accepted*. It matters not that the previous system lacked *legitimacy*. Even if it would have

71. In the United States even sympathetic commentators frankly admit that some of the Supreme Court's decisions are simply irreconcilable with the Constitution's text: see Grey (1975) at 710-714; Munzer & Nickel (1977) at 1031-1032; Brest (1990) at 250; Strauss (1996) at 920-923. Grey (1975) cites the Supreme Court's protection of abortion, its due process jurisprudence, its invalidation of electoral malapportionment, and perhaps its decision in *Brown* (1954). Munzer & Nickel (1977) point to the universal acceptance of "executive agreements" with foreign powers, which bypass the Constitution's requirement that the Senate ratify international treaties. One might well add the Legal Tender Cases (discussed above fn 32).

Australian judicial decisions have not departed from Constitutional text so obviously. Some might consider the majority reasoning in the implied rights cases - *Nationwide News* (1992), *Australian Capital Television* (1992), *Theophanus* (1994), and *Stephens* (1994) - as a clear and deliberate departure from the Constitution's text. In *McGinty* (1996) at 235-236 McHugh J describes the reasoning of these decisions as "fundamentally wrong and ... an alteration of the Constitution without the authority of the people under s 128 of the Constitution".

72. Grey (1975) at 709 claims that in its judgment in *Roe v Wade* (1973) the Supreme Court of the United States "is quite openly *not* relying on constitutional text for the content of the substantive principles it is invoking". One wonders, therefore, why the Court invoked the text at all.

been better in the past to ferment revolution against the system of authority, in the present continuity may be more important.

Of course, today's regime may bear the taint of past illegitimacy. Rulers who impose unjust substantive laws are also likely to create subsequent schemes for authority which facilitate further injustice. Not surprisingly, therefore, new regimes are more likely to gain popular acceptance if their rules are drafted and implemented by those unconnected with the previous regime.⁷³

Thus the argument from coordination explains the intuition that an enlightened regime can be legitimate despite its derivation from an unjust regime. The argument also explains the intuition that suspects the legitimacy of a regime which has succeeded to the authority of an unjust regime.

10.4.2 Text centrism

The argument from coordination also explains the text-centrism of courts. With only very rare exceptions, courts invariably *claim* that constitutional decisions are the logical outcome of a Constitutional document [10.3.7]. The rhetoric of the Constitution's mandate is powerful because it claims that the current system of authority is consistent with previous authoritative directives. According to the argument from coordination, such consistency and certainty make more likely the general acceptance which is a condition for legitimacy. Furthermore, the explicit, textual directives of a written Constitution are easier to establish than the fact of general obedience to a court's directives.

10.4.3 Rules of recognition

Hart argued in the *Concept of Law* that a legal system can be identified by general agreement, amongst officials if not the population, on rule(s)⁷⁴ of recognition. Whether a norm is part of a legal system is indicated by whether it was promulgated in accordance with these rules of recognition. In Australia, the rules of recognition today include requirements to obey the Commonwealth Constitution, the *Westminster Acts*, the *Australia Acts*, and accepted judicial precedents [4.3, 5.6].

Hart claimed that rules of recognition were identified by observing current practice. He suggested that inquiries into legal authority then came to an end [4.1.2]. Thus Hart

73. Linz & Stepan (1996) at 82-83.

74. Hart (1994) at 95 makes clear that in a modern legal system the rules of recognition may be more complex than a simply stated "rule".

highlighted the importance of current practice. The argument from coordination also requires a system of authority to be consonant with current practice, and the rules that identify it. To this extent it is consistent with Hart's account of what constitutes a "valid" legal system. However, unlike the rule of recognition, the argument from coordination is normative: it discusses why a "legally valid norm" is also morally binding. The argument provides reasons to identify the rule of recognition in particular ways, and in particular by reference to previously authoritative norms where possible.

10.4.4 Popular sovereignty

Arguments that authority resides in the people are similarly explicable. It is a *necessary* condition of legitimacy that the authority be accepted in the present. The "will of the people" stresses the importance of general obedience in the recent past. The argument from coordination accepts that this general obedience is a condition of legitimacy. But the structure of the argument from coordination makes clear that this recent general obedience is merely part of a larger argument.

The "will of the people" also invokes ideas that democratic government has both inherent and pragmatic virtues lacked by other forms of government [4.5, 6.6.1]. The argument from coordination concedes that these virtues may affect a regime's legitimacy, but is careful to note that democracy is neither a necessary nor a sufficient condition of legitimacy.

10.4.5 Founders

The argument from coordination shows how a legitimate constitutional system usually has continuity with historic events. Consistently with this, appeals to the Founders highlight the crucial historic events in drafting and inaugurating a particular constitutional document, and link those events to the law of today.⁷⁵ However, the argument from coordination supplies an element missing from originalist theory: a cogent moral reason for guiding current conduct by past events. And it also shows how subsequent general conduct may limit the authority of the Founders.

10.5 Conclusion

The argument from coordination has never been popular in Australian constitutional theory. Its complexity is doubtless off-putting compared to the simplicity of references to the

75. Chapter 7.

“will of the people”. It may also be thought to invoke ideas of “natural law” or “formalism”. These shibboleths should be cleared away.

10.5.1 Natural law

Kirby J labelled the argument that law binds because of “higher moral principle” a “siren song”.⁷⁶ His concerns appear to stem from the belief that if moral principle (which he later referred to as “natural law”) provides the authority for applying rules, then it also provides authority for disregarding rules in favour of “deep rights” inherent in the common law.⁷⁷ Ironically, however, Kirby J buttressed this argument with the claim that because there is no “logical limit to [the] ambit” of fundamental rights”, they “undermine a rule of law”.⁷⁸ But what is an appeal to the rule of law if not an appeal to moral principle?

Similarly, Winterton suspected what he called “fundamental law” doctrine for a number of reasons.⁷⁹ First, the community does not accept that judges should invalidate legislation except if it is contrary to the posited Constitution. Secondly, such a doctrine relies on the “subjective opinion of each judge as to the content of fundamental moral principles.”⁸⁰ However, like Kirby J, Winterton was self-contradictory. He was ultimately providing a *moral* argument about how judges *should* behave.

In any case, the fear of “natural law” is misplaced. Rooting the Constitution’s moral authority in universal moral principle does not necessarily imply that judges should override the Constitution’s text whenever they conflict with the judge’s perception of moral norms. The argument from coordination is a “natural law” argument - it appeals to universal norms to demonstrate its validity.⁸¹ But the argument from coordination is perfectly consistent with a restrained judicial approach which claims that there are good moral reasons to apply rules rather than a judge’s own perception of direct reasons [10.3.4].

Indeed, the argument from coordination stresses the virtues of settling constitutional norms by authority, and the advantages of closing this set of norms [10.2.4]. Ironically, this “natural law” argument may contradict Kirby J’s advocacy of drawing broad implications

76. Kirby (1997a).

77. Kirby (1997a); *BLF* (1986).

78. *BLF* (1986) at 405, approving *British Railways Board v Pickin* (1974) at 782. For a similar argument in similar language, see Winterton (1986) at 239.

79. Winterton (1986) at 231-235.

80. Winterton (1986) at 234.

81. See Finnis (1995) identifying such appeals as a key feature of “natural law” theory.

from the constitutional text.⁸² Such implications, particularly when not subject to a genuinely strict test of necessity, threaten to unpick the “closure” of fundamental norms. The argument from coordination shows how this closure ought to be an aim of fundamental legal norms.

10.5.2 Formalism

Alternatively, critics of the argument from coordination might label it as excessive “formalism”.⁸³ Mason CJ identified “legal formalism” with the philosophy articulated by his predecessor, Dixon CJ.⁸⁴ This philosophy claims that judicial decisions are often deducible from statutes, precedent and legal principles. It allows the inevitability and desirability of judicial law-making where these sources conflict, or are ambiguous in their application to novel circumstances. However, it denies the legitimacy of deliberate judicial innovation contrary to these sources.⁸⁵

Mason CJ criticised this philosophy as being contrary to justice. Mason CJ identified the justification for formalism as the protection of public confidence in the administration of justice by avoiding controversial value judgments.⁸⁶ He implied that this justification is incoherent because judges inevitably make value judgments,⁸⁷ and that therefore there is little reason to pursue formalism at the expense of justice

Mason CJ’s later work on judicial method only makes passing references to “the need for continuity and certainty”,⁸⁸ and does not analyse the real reasons for desiring continuity and certainty. These are valuable not so much as to maintain the authority of the judicial office, but to promote coordination. Constitutional text and old judicial decisions can potentially provide more certain guidance to coordinated action than reliance merely on recent judicial decisions [10.3.5]. However, constitutional text and old judicial decisions will be poor guides to action if they are not reliable guides to judicial decisions in the near future.

82. Kirby (1997a).

83. This term is often not defined with more precision than the implication of abuse. Ironically, Soviet authorities used the same term to describe the music of Shostakovich and some other composers of his period: in this context it was also more an indication that actions were unacceptable than a reference to definable criteria for criticism.

84. Mason (1987) at 155.

85. Dixon (1965) at 158, quoted extensively in Mason (1987) at 155.

86. Mason (1986) at 4; Mason (1987) at 156.

87. Mason (1986) at 5; Mason (1987) at 158-159.

88. Mason (1987) at 156. Mason (1976) at 387 considers the rule of law, but this concept is not emphasised in his more recent writing. There is no apparent reference in his work to the coordinating function of law.

Despite his attack on formalism, Mason CJ nevertheless concluded that:

The “text of the Constitution must always remain the principal foundation of constitutional interpretation. ... In the final analysis the Constitution is our paramount law, and interpretation requires that we give effect to its language and heed what it says.⁸⁹

Bereft of arguments in favour of rule-following, it is unclear why this result follows.

“Interpretation” is hardly a moral principle, so it is difficult to see how it could “require” anything. This passage simply asserts the continued relevance of the Constitution’s text.

The argument from coordination provides some substantive moral argument for Dixon CJ’s philosophy, and for Mason CJ’s conclusion. The argument from coordination provides cogent arguments for applying constitutional rules. And it supplies the moral argument missing from Mason CJ’s assertion that the Constitution remains our “paramount law”. However, the argument from coordination does *not* imply that rules never outweigh justice, nor that textualist interpretations should always be preferred. The argument merely suggests that there will almost invariably powerful reasons to apply the text of a legitimate constitution.

10.5.3 The legitimacy of the Australian Constitution

The argument from coordination provides moral reasons for obeying many constitutions. It claims that a constitution should be obeyed if it accords with both general practice and previous authoritative norms. The Australian Constitution is part of a set of fundamental norms which meet both criteria. However, legitimacy fails if the costs of revolution outweigh the advantages of an alternative constitution. It is doubtful that constitutional change would substantially improve Australia’s governance; it is incredible that such improvement would outweigh the uncertainty of revolution.

There remain good reasons to rely on moral considerations rather than the Constitution’s text in some circumstances. The Constitution’s text is not *conclusive* of either legal or moral obligations. The extent to which individuals and judges do consider the Constitution’s text determinative depends on beliefs about the determinacy of language, the determinacy of morality, and the interaction between the rules of a system.

89. Mason (1995) at 245.

Chapter 11 - Conclusion

11.1 The authority and legitimacy of the Constitution

The Australian Constitution has “legal authority” because the textual rules which it contains provide presumptive reasons for legal decisions. The Constitution has “legitimacy” because it is morally desirable to presume that such legal decisions are a sufficient basis for action. Moral considerations themselves indicate the weight which should be accorded to those presumptions, both in determining the content of “law”, and in determining whether a law should be obeyed [3.2.2, 0].

The Constitution’s legitimacy stems from its capacity to identify norms as legal rules, and so provide a means for authoritative and coercive coordination. “Who will coordinate?” is itself a coordination problem [10.2.4]. Thus there is real value in settling the location of authority, where possible, in terms of the directives of a prior authority. Consequently, Australian law should, where possible, be identified by reference to earlier legal norms, and in particular the enactments of the Imperial Parliament. These enactments identify the Australian Constitution as a key source of valid law for Australia [10.2.5]. It does not matter to this argument that the Imperial Parliament no longer has authority to make *new* laws for Australia.

There would nevertheless be moral reasons to reject this identification of Australian law if it were a regime so wicked that it is possible to imagine an alternative regime, and the improvements of that alternative regime would justify the dislocation and loss of coordination inevitable in a revolution. It is difficult to imagine any such alternative regime for Australia.

This explanation of the Constitution’s legitimacy explains the intuitive appeal, as well as the flaws, of many other explanations for the Constitution’s legitimacy. The Constitution’s legitimacy *does* depend on its current acceptance. It also depends on the Constitution being “willed” by the people sufficiently to acquiesce in its operation. And it depends on derivation from an enactment of the Imperial Parliament. But all these explanations of the Constitution’s legitimacy are merely *part* of the more complete justification for legitimacy which I have outlined [10.4].

If popular sovereignty is identified with democracy (and this connection is *not* a necessary one), then claims that legitimacy depends on popular sovereignty are reflected in other ways. If a constitution is drafted by a democratically elected body, and if a

democratically elected legislature acts in accordance with such a constitution, the outcomes are *more likely* to be in the interests of subjects than government by autocracy. Democratic processes may also be worthwhile because they promote autonomy. However, democracy is neither necessary nor sufficient for legitimacy [4.5].

The weight of the obligation to obey the Constitution may be increased by the fact that it embodies a compact between a number of political communities. There are good, albeit not conclusive, reasons to honour such agreements. Keeping yesterday's promises is often important to encouraging political institutions to enter into further schemes of cooperation tomorrow [8.2].

Of course, judicial review, whether in accordance with the Constitution, or outside it, can be a powerful means for protecting individuals against unjust actions by the state. Whether judicial review of this sort is indeed justified depends on having confidence that judges are indeed better than legislatures and executives at identifying an appropriate balance between the competing interests of individuals. However, judicial review to protect rights is only a *consequence* of the state existing. Before judges can protect rights, there must be rules which *constitute* the state in the first place [9.3].

Thus using an analysis of contemporary analytical jurisprudence, this thesis restates the “central tradition”¹ of western political and moral thought. The primary role of the state and of law is to assist individuals to achieve the good. The state has wider functions than merely protecting the choices of individuals.

11.2 The popularity of popular sovereignty

Even though it is possible to justify the Constitution's legitimacy as I have outlined, Australians in recent years have tended to seek to justify the Constitution as embodying the “will of the people” [6.1]. However, at best the will of the people has very limited relevance to the obligation to obey the Constitution. Why did Australian academic and judicial writing support the popular sovereignty theory despite all of these objections? Indeed, why were these propositions so widely accepted with so little argument?

11.3 A jurisprudential mistake

The rise of “popular sovereignty” as an explanation for the Constitution's moral authority may have been due to the notion that no other explanation exists. Some believe that

1. This was Isaiah Berlin's description, noted in George (1993) at 19.

the *Australia Acts* (1986), and the legal independence of Australia which they enacted, now preclude the claim that the Constitution's authority is derived from the authority of the Imperial Parliament. The belief reflects a venerable, albeit flawed, jurisprudential theory [4.1.2] and was widely accepted by Australian judges and leading academics.²

Deane J, for example, thought that Australian courts could not ignore a new Act of the Imperial Parliament purporting to apply to Australia unless the authority of the Constitution were derived from a source *other* than the Imperial Parliament.³ Because he thought that Australia was independent, and that obedience to an undesired Act of the Imperial Parliament was unimaginable, he assumed that a change in theory was necessary. However, this is a logical error. The fact that Australian institutions *derive* their authority from the Imperial Parliament does not, even as a matter of "traditional legal theory", imply that they continue to be *subordinate* to the Imperial Parliament [5.3]. The source of authority can be historic - it need not have an ongoing life of its own.

The alternative proposed by Zines was to claim that the Constitution is law because it is accepted.⁴ This answer is inadequate. Whilst acquiescence is necessary for legitimacy, the mere fact of acquiescence is insufficient as a *moral* reason for obedience [6.3.1]. Whilst in ordinary legal reasoning it is enough to point to a superior norm which identifies ϕ as law, such an argument is inadequate when justifying the legal system itself [1.2].

Although Zines' claim was not expressly repudiated by other leading commentators, its failure to argue for legitimacy was manifest. The enthusiasm for popular sovereignty was then born of the notion that no other theory existed which could legitimate Australian institutions.⁵ There are in fact continuing legal and moral reasons to obey the Imperial statute containing the Australian Constitution even though the Imperial Parliament no longer has power to make new laws with respect to Australia. But the *notion* that such legal and moral reasons could not exist is an important explanation for the rise of the theory of popular authority.

2. Kirmani (1985) at 410 per Brennan J; *Nationwide News* (1992) at 138 per Mason CJ; Zines (1991) at 27; Zines (1997b) at 93; Sawyer (1987) at 71; Blackshield (1994a) at 26.

3. Kirmani (1985) at 442.

4. Zines (1997b) at 93.

5. Finn (1995) at 4; Irving (1997) at 115. Cf Fuller (1967) at 93-94: "[a] fiction is by no means so transparent to the man who resorts to it in his struggle to solve an embarrassing problem. To him the fiction often seems, not simply the easiest way out of his difficulties, but the only way out."

11.4 Judicial promotion

A more cynical explanation is that popular sovereignty was promoted by some Australian judges concerned to protect individual rights, but conscious that existing constitutional doctrine severely limited their ability to do so. They may have seen popular sovereignty as a tool sufficiently ambiguous that judges would be able to define the will of the people. At the same time, rhetoric about popular sovereignty was sufficiently powerful that it could legitimate judges invalidating legislation despite existing constitutional constraints.⁶

Traditionally judges of the High Court have preferred the limits of rights to be determined by common law and statute rather than constitutional decision.⁷ The text of the Australian Constitution strictly limited judicial review of legislation on the basis that it infringed individual rights. With some exceptions,⁸ constitutional grants of power to government were not read subject to implied limitations.⁹ In the early 1990s, several commentators noted that some members of the High Court were moving away from this view.¹⁰ Some judges came to view the courts, rather than Australian parliaments, as better judges of the limits of individual rights.¹¹

In effect, the presumption weakened that the Constitution's text provides reasons for action. A key directive of the Constitution is that laws of the Commonwealth Parliament are valid if they deal with a subject matter assigned to the Commonwealth Parliament. Some judges became less confident that outcomes in accordance with the Constitution's text - i.e. parliamentary statutes - were all morally desirable. If they had said so, they would have reduced the ability of the Constitution to "close" the Australian legal system. They would have implied that subjects could succeed more often in overturning the presumption that they should act according to previously posited legal rules.

6. Indeed, Wright (1998) argues that the desirability of judicially implied individual rights is the primary basis on which adoption of a theory of popular sovereignty could be justified.

7. Stephen (1982) at 345-348; Mason (1989) at 79.

8. In particular, s 51(31) is interpreted to mean that all s 51 heads of power are read down to require just terms if property is acquired; and s 51(13-14) is interpreted to prevent the Commonwealth from using other powers to control State banking and insurance: see Zines (1997a) at 24-26.

9. *Jumbunna* (1908) at 367-368; Zines (1997a) at 20-21.

10. Kennett (1993) at 36, 39; Doyle (1993) at 29-30.

11. Toohey (1992) at 163; Brennan (1991) at 34-35; McHugh (1988) at 123-124, although His Honour concentrated more on the court's relative advantage over legislatures in dealing with rapidly changing social values and practices.

For an overview of the case law manifesting the developing judicial enthusiasm for non-economic rights, constitutional or otherwise, see Kennett (1994).

Toohey J perceived that a more active judicial role could be justified by the theory of popular sovereignty. In 1992 he suggested that Constitutional heads of power might be interpreted on the basis that they did not permit infringement of fundamental common law freedoms.¹² He thought that judges might be justified in doing so because in these circumstances judicial review would be as good a reflection of the will of a majority of citizens as the decision of the legislature.¹³ In the implied rights cases other judges also made this link between popular sovereignty and individual rights. They adopted a theory of popular sovereignty, asserted that the will of the people is a fundamental norm, and proceeded to invalidate legislation as inconsistent with that theory, whether or not the legislation breached any *textual* rule of the Constitution.¹⁴ Australian academics noted wider areas in which norms derived from popular sovereignty might “trump” the Constitution’s text.¹⁵

It is unlikely that the theory of popular sovereignty was developed simply to justify these constitutional results. More likely, the results were desired, and the theory of popular sovereignty was a convenient prop. Because the “will” of the people is inevitably inchoate, popular sovereignty was a potent tool for providing ostensible justification for actions by any political institution, such as the High Court, able to purport to articulate that will. As Lindell concluded, there is an “inherent danger” in using the notion of the sovereignty of the people in constitutional interpretation. “If used in that way it increases immeasurably the potential of judges to give effect to their own subjective beliefs regarding limitations that should be placed on the role of government in our society.”¹⁶

12. Toohey (1992) at 170.

13. Toohey (1992) at 171-174.

14. *Australian Capital Television* (1992) at 138-139 per Mason CJ; *Nationwide News* (1992) at 72-73 per Deane and Toohey JJ; *Theophanous* (1994) at 180 per Deane J (restrictions on communication are invalid because they impair the capacity of government to reflect the will of the people); *Metwally* (1984) at 476-477 per Deane J (popular sovereignty requires viewing the Constitution as “ultimately concerned with the governance and protection of the people”); *Leeth* (1992) at 486 per Deane and Toohey JJ; *Kruger* (1997) at 96-97 per Toohey J (popular sovereignty implies equality of the people, and thus a requirement that law treat people “equally”). Off the bench, judges made wider suggestions: Kirby (1997b) (popular sovereignty may imply that people have reserved “deep-lying rights”); Mason (1996c) at 45 (executive or parliamentary action is beyond power if its character is such that it would not have been authorised by the people).

15. Doyle (1995) at 151 (will of the people shifts emphasis of constitutional interpretation from creating structures for the exercise of power to protection of people from misuse of parliamentary power); Williams (1994a) at 95-96 (Parliament has no power to act inconsistently with the implications of popular sovereignty, including civil liberties); Zines (1997b) at 98-99 (popular sovereignty may require right to vote and rough equality of the effect of each vote).

16. Lindell (1998) at 144.

11.5 “Rights talk”

Popular sovereignty is connected with individual rights in a deeper way. The rise of rights, and the theory of popular sovereignty, are both underpinned by the same shift in values. This shift may explain why, in the words of Deane J, popular sovereignty is a “more acceptable contemporary explanation” for the authority of the Constitution.¹⁷

As noted earlier, according to the “central tradition” of western political and moral thought, the state’s role is to assist individuals to achieve the good. Providing individuals with the opportunity to make autonomous decisions is only one good among many. Just as important, if not more so, is for government to encourage people to make *good* choices.¹⁸

By contrast, the dominant strand of political theory in the second half of the twentieth century has given individual autonomy a higher priority. Whilst government should promote “the Right”, it is desirable for individuals to be left to make their own choices between conceptions of “the Good”.¹⁹ The priority of the Right follows from the overarching value of individual autonomy.²⁰

This shift in basic values was accompanied by the rise of rights-based analysis. If we value individual autonomy more highly, then we correspondingly value a right which protects the individual’s opportunity to make a choice, rather than government action which may promote one (putatively good) choice over another. The major function of many rights is to mark out an area in which state interference is illegitimate and within which outcomes will be determined by individual choice.²¹

17. *Breavington* (1988) at 123 per Deane J.

18. This view of the State’s responsibility for morality can be traced through Aquinas to Aristotle, and is outlined in George (1993) at 19-47. George (1993) at 226-228 goes further, and argues that an autonomous choice between good and evil is *only* intrinsically valuable if the person chooses for the good.

19. Rawls (1972) at 207, 327-328; Rawls (1993) at 38; Dworkin (1985) at 191-192 outlines a theory of liberalism similar in this respect.

20. Rawls (1972) at 253, 515-516. Rawls (1993) at 99-110 attempts to dissociate the priority of the Right over the Good from the claim that autonomy is an over-riding value. Instead this priority is ultimately derived from the desirability of a stable and agreed political framework: see Raz (1995) at 69-70. The failure of this “shallow” theory not based on autonomy is discussed in Raz (1995) at 81-84. The theory of equal concern and respect in Dworkin (1977) at 272-273 ultimately also assumes that there is some fundamental value in autonomous choices.

21. Not all rights have this function. MacCormick (1977) shows that many rights confer a “benefit” without conferring a “choice” on the right-holder.

Of course, analysis in terms of rights is not a new phenomenon. However, in the latter half of the twentieth century, more rights have been seen more often as “trumps”,²² which take precedence even if they are contrary to the general interest.²³ This result is understandable against a background which promotes individual autonomy as an important - if not overriding - value, even where individuals may choose foolishly or unwisely.

The increased valuation of individual autonomy is also reflected in the rise of popular sovereignty. The dominant tradition in political theory before the Enlightenment viewed government as legitimate if it promoted the good life. This justification is inadequate if one assumes that autonomy has an over-riding value. Government must then be justified principally in terms of promoting autonomy. But many of the functions of modern government (building sports stadiums, organising education, and so on) do not obviously promote autonomy, and are certainly not neutral between different conceptions of the good.²⁴ Popular sovereignty provides a means to square this circle. If government can be seen as the *choice* of the people, then its failure to be neutral between conceptions of the good is justifiable on the basis that government itself is an exercise of “the people’s” autonomy.

Thus the value of autonomy may conceptually relate the rise of popular sovereignty and the increased emphasis on individual rights, both in Australia and internationally.

Some may not be convinced that Australian judges are so Machiavellian, or so responsive to changes in political theory. The rise of the theory of popular sovereignty may merely have been a combination of the mistake that *derived* authority depended on *continued* authority, and a failure to appreciate the weaknesses of the theory of popular sovereignty as a moral argument. Around the world, “popular sovereignty” has been a popular justification for constitutional authority ever since the founding of the US Constitution. Wade suggested that as the result of having no written constitution “the closer [British] judges come to constitutional bedrock the more prone to disorientation they seem to be”.²⁵ The enthusiasm of Australian judges for popular sovereignty suggests that there is no guarantee that judges will fare any better with a written constitution.

22. On this conception of (individuals’) “rights as trumps”, see Dworkin (1984).

23. Dworkin (1977) at 269.

24. Sometimes government action merely provides facilities so that subjects all have the opportunity to pursue their individual conceptions of the Good. However, much government action cannot be rationalised in this way: philosophy is preferred over witchcraft; good art is preferred over bad; and living in families rather than as hermits.

25. Wade & Forsyth (1994) at vi.

11.6 The uses of theory

This story about the changing theories for the legitimacy of the Australian Constitution illustrates how jurisprudential theory is not merely an abstract corner of philosophy, but a field with important insights for practical law. Jurisprudence will seldom prescribe answers, but it may provide a means to avoid building elaborate structures upon logical mistakes.

It may be possible to generalise the theory which I have developed in the context of the Australian Constitution. The theory may well be applicable, with minor modifications, to the constitutions of other countries, particularly those derived from former colonies of the United Kingdom. I leave that work to others. They may find that my theory will be no more fashionable in their countries than it has been in Australia over the last decade. Twentieth century rhetoric has emphasised “rights” and the “will of the people”. But perhaps the next century will see a more mature realisation that the state, the interests of individuals, personal autonomy, and democracy, all have logical justifications which do not need the support of dubious rhetoric.

Will any of this help Phil Cleary? I hope that this thesis has outlined an explanation of why the High Court might have been justified in depriving him of his seat in the Commonwealth Parliament. There were good moral reasons for judges to act in accordance with the legal norms of the Constitution’s text. Judges, academics, and Australian citizens should be proud to say so.

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